Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1995

WESLEY KEAT,

Petitioner,

v.

MARIA DE LA LUZ CHAVEZ, et al.,

Respondents.

Petition For Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division Two

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a uniformed police officer illegally enters a residence and is forced to fatally shoot an occupant in self-defense, does a jury's finding that the officer did not use excessive force in violation of the Fourth Amendment under the totality of circumstances test of *Graham v. Connor*, 490 U.S. 386 (1989) preclude imposing liability on the officer for the death of his assailant under 42 U.S.C. § 1983 based on a theory that but for the illegal entry, the shooting would not have occurred?

2. Where a uniformed police officer illegally enters a residence and is then subjected to an illegal life-threatening assault by an occupant compelling the use of reasonable force in self-defense, does the occupant's use of illegal force constitute a superseding intervening act as a matter of law, so as to cut off the officer's liability for the illegal entry under 42 U.S.C. § 1983?

3. Does the Due Process Clause of the Fourteenth Amendment require that a plaintiff produce evidence of the defendant's financial condition to support a constitutionally valid award of punitive damages or may the burden of proof be shifted to defendant to introduce such evidence to avoid an unconstitutionally destructive award?

LIST OF PARTIES (Rule 14.1(b))

The parties to the proceeding below were the petitioner and defendant Wesley Keat, defendants John Ammar, the County of Riverside, and plaintiffs and respondents Maria De La Luz Chavez, the Estate of Crescencio Chavez, Sr., Crescencio Chavez, Jr., Steven Chavez, Maria Louise Huerta, Ernesto G. Chavez, Paula Chapa, Rose Del Toro, Arturo G. Chavez, Juan Francisco Chavez, Dora Luz Torres and Bertha Palomo. Judgment in favor of the County of Riverside and John Ammar was entered in the trial court, and they were not parties to the subsequent appeal.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Wesley Keat respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division Two, entered in the above proceeding on May 15, 1995.

OPINIONS BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division Two, is partially reported at 34 Cal. App. 4th 1406, 41 Cal. Rptr. 2d 72 (Cal. Ct. App. 1995), and is reprinted in the Appendix ("App.") at pages 1 to 28, *infra*. The judgment of the Riverside County Superior Court that was affirmed by the California Court of Appeal was not reported. It is reprinted in the Appendix at pages 82 to 90, *infra*.

The California Supreme Court's order denying review of the Court of Appeal's opinion was not reported. It is reprinted in the Appendix at page 96, *infra*.

JURISDICTION

The opinion of the California Court of Appeal, Fourth Appellate District, Division Two, was entered on May 15, 1995. App. at 1. On June 26, 1995, petitioner timely filed a Petition for Review in the California Supreme Court pursuant to rules 28(b) and 40(n), California Rules of Court. On September 14, 1995, the California Supreme Court issued its order summarily denying the Petition for Review. App. at 96. The remittitur issued from the Court of Appeal on September 21, 1995. App. at

58. The jurisdiction of this Court to review the judgment of the California Court of Appeal, Fourth Appellate District, Division Two, is invoked under 28 U.S.C. section 1257.[1]

STATUTES INVOLVED

A. Fourth Amendment to the United States Constitution.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

B. Fifth Amendment to the United States Constitution.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any

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[1] As review of the court of appeal decision reveals, the court squarely addressed the issues concerning liability for use of force under 42 U.S.C. § 1983 presented in questions 1 and 2 and the due process issue raised in question 3. *Orr v. Orr*, 440 U.S. 268, 274-275 (1979) [state court's resolution of federal question demonstrates federal question properly raised in proceedings]. Moreover, as required by Supreme Court Rule 14.1(h), the statement of the case, *infra*, specifies the stages in the proceedings both in the court of first instance and the appellate courts at which the federal questions sought to be reviewed were raised.

person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

C. Fourteenth Amendment to the United States Constitution, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

D. 42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of

Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE AND RELEVANT FACTS

A. The Underlying Incident and Trial.

On November 8, 1985, Riverside County Sheriff's Deputies John Ammar ("Ammar") and Wesley Keat ("Keat") responded to a call from Lorinda Rios about an argument about to become physical at the Rios home, next door to the Chavez residence. Keat, who arrived first, spotted two men – later determined to be Danny Rios ("Danny") and Crescencio Chavez, Jr. ("Junior") – standing outside the Chavez residence. Upon seeing Keat, Danny and Junior retreated into the Chavez house.[2] Believing them to be the two men who were involved in the argument reported by the neighbor, Keat quickly followed them into the house without first knocking and announcing himself.

Mr. Chavez, Sr. ("Mr. Chavez"), who was in the home, saw Deputy Keat enter and follow Junior and his toddler son, Steven, into the back of the house. When Deputy Keat attempted to escort Junior outside, a melee ensued in the living room of the Chavez home involving Junior, Steven, Mr. and Mrs. Chavez, Deputy Keat and Deputy Ammar, who entered the home when the melee began. During the course of this encounter, Mr. Chavez left the room, returned moments later with a gun, and began to fire at the deputies. Deputy Keat testified that

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[2] There was some dispute in the testimony as to whether the two men ran or walked into the residence.

Mr. Chavez fired at him at almost point-blank range, the bullet whizzing past his head and smoke and powder from Mr. Chavez's gun striking him in the face. Deputy Ammar received a bullet wound in his arm. The deputies returned fire, killing Mr. Chavez. Two neighbors testified that Mr. Chavez had simply fired at the ceiling.

Plaintiffs, including Mrs. Chavez, Junior, Steven and the Estate of Mr. Chavez,[3] sued Keat and Ammar in state court alleging state tort claims and federal civil rights claims under 42 U.S.C. § 1983 based on use of excessive force and illegal search and seizure.

At trial, very little evidence was offered in support of plaintiffs' claims for damages. Mrs. Chavez testified that she was deeply affected by her husband's death, suffering emotional distress even to the time of trial. She further testified that her husband had worked without pay at his oldest daughter's ranch prior to his death. Rose Del Toro, a daughter of the decedent, testified that she and her siblings expended $503.95 on an ambulance, $2,397.20 on the funeral home, $1,276.00 on the cemetery, and an undisclosed amount on flowers. Arturo Chavez, a son of the decedent, testified that he expended $1,200.00 on the

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[3] There are twelve plaintiffs. The four main plaintiffs are the Estate of the decedent Mr. Chavez ("the Estate"), Mrs. Chavez, Junior and Steven. Also named were the adult children of the decedent – Maria Louise Huerta, Ernesto G. Chavez, Paula Chapa, Rose Del Toro, Arturo G. Chavez, Juan Francisco Chavez, Dora Luz Torres and Bertha Palomo. These eight children of the decedent were not present at the Chavez home on the night in question, and were parties to the state law wrongful death cause of action only.

emergency room. No testimony was presented concerning any damages arising solely from the illegal entry itself, separate and apart from the death of Mr. Chavez.

B. The Verdict

The jury returned a special verdict in favor of defendants on all causes of action except for violation of civil rights.[4] App. at 60-66. On that cause of action, the jury returned a verdict against defendant Keat and in favor of plaintiffs Mrs. Chavez, Junior, Steven, and the Estate. App. at 67-76. In its special findings, the jury expressly found that Deputy Keat had not used excessive force against any of the plaintiffs, including Crescencio Chavez, Sr. App. at 77-79. The jury found, however, that Keat illegally entered the residence in violation of the Fourth Amendment. App. at 79-80. It awarded Junior and Steven nominal damages ($1.00 each) for the illegal entry, but awarded $406,000 in compensatory damages to Mrs. Chavez and the Estate of Mr. Chavez for the same illegal entry. App. at 69-75. The jury also awarded $100,000 in punitive damages in favor of Mrs. Chavez against Keat. App. at 69.

C. Post Trial Motions And Judgment

Keat filed a motion for new trial and motion for judgment notwithstanding the verdict, based in part on juror misconduct and qualified immunity. Juror declarations filed in support of the motions demonstrated an

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[4] The court granted the County of Riverside's motion for directed verdict on the federal claim and hence it did not go to the jury.

overt, verbal agreement by jury members to award Mrs. Chavez damages for the loss of her husband. Keat argued that since the jury had found in his favor on the excessive force claim, no damages could be awarded for Mr. Chavez's death. Keat also argued that the punitive damage award was improper because plaintiffs failed to introduce evidence of Keat's financial condition. Both motions were denied.

A final, appealable judgment was filed October 9, 1992 (App. at 87), and entered nunc pro tunc as of September 17, 1992. App. at 82; Cal. Civ. Proc. Code § 904.1 (West Supp. 1995).

D. The Appeal.

Keat filed a timely notice of appeal on November 6, 1992. In his opening and reply briefs, Keat argued, among other points, that the damage award as to Mrs. Chavez and the Estate was improper and excessive in that the damages were awarded to compensate Mrs. Chavez for the death of Mr. Chavez, and that the jury's exoneration of Deputy Keat with respect to the excessive force claim barred recovery of such damages. Keat also asserted that the punitive damage award was improper and violated due process, since in applying the rules of federal common law, the trial court did not require the plaintiffs to introduce evidence of Keat's financial condition to demonstrate that Keat would not be financially destroyed by having to pay such an award. In their respondents' brief, plaintiffs argued that the verdict as to Mrs. Chavez and the Estate was proper, since but for Deputy Keat's illegal entry, the shooting would not have occurred, notwithstanding the jury's finding that Keat did not use excessive force in shooting Mr. Chavez.

On or about February 26, 1995, the Court of Appeal, Fourth Appellate District, Division Two, issued its tentative decision affirming the judgment. App. at 32. Following oral argument, on March 16, 1995, the Court of Appeal issued an order vacating submission of the case and ordering the parties to submit supplemental letter briefs addressing several issues, including whether "the special finding that Keat did not 'wrongfully cause the death' of Mr. Chavez . . . [is] inconsistent with . . . [t]he verdict in favor of Mrs. Chavez . . . given that the juror declarations . . . indicate that all or part of the compensatory damages awarded to her were calculated to compensate for losses resulting from the death of Mr. Chavez, i.e., lost income of $25,000 per year for 16 years" and "[t]he verdict in favor of the Estate . . . given that the juror declarations . . . indicate that the compensatory damages awarded to it were calculated to compensate for losses resulting from the gunshot wound which resulted in the death of Mr. Chavez, i.e., his 'medical treatment bills'?" App. at 29-31. The court further enquired if " . . . there [is] evidence in the record of losses or injuries suffered by Mrs. Chavez which were caused by Keat's illegal entry but not by the death of Mr. Chavez, which could support an award of up to $400,000 in compensatory damages?" App. at 30-31.

On April 20, 1995, Keat filed his supplemental letter brief responding to the court's inquiries. Keat noted that the jury's findings exonerating Keat for wrongful death both under state law and excessive force under § 1983 were plainly inconsistent with its having awarded damages to Mrs. Chavez and the Estate for Mr. Chavez's death, citing several federal circuit court opinions. Keat also pointed out that there was no evidence in the record

of any losses or injuries suffered by Mrs. Chavez unrelated to the death of Mr. Chavez which were caused by Keat's illegal entry and which would support an award of $400,000 in compensatory damages.

On April 5, 1995, plaintiffs filed their supplemental brief. In response to the court's questions, plaintiffs simply argued that since Keat illegally entered the residence, all damages flowing from the entry, including Mr. Chavez's death were compensable.

On May 15, 1995, the court of appeal issued its opinion affirming the judgment, certifying several portions for publication pursuant to California Rules of Court, rules 976(b) and 976.1. App. at 1. The court concluded that the jury's finding that "the shooting of Mr. Chavez was justified" and Keat had not used excessive force under the Fourth Amendment was not inconsistent with awarding damages to Mrs. Chavez and the Estate for her husband's death under § 1983, since the jury could find "that the death of Mr. Chavez and the damages that resulted from it had at least two proximate causes: Keat's shooting of his weapon and Keat's entry into the house." App. at 8-9. With respect to Keat's contention that the punitive damage award violated due process, the court concluded that this Court had already upheld such an allocation of the burden of proof in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). App. at 15-17. The court also reasoned that even in the criminal trial context it was permissible to shift the burden of going forward with the evidence to the defendant at some stage, so long as the prosecution had first " 'proved enough to make it just for the defendant to be required to repel what has been proven with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for

knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.' " App. at 17, quoting *Speiser v. Randall*, 357 U.S. 513, 524 (1958).

On May 30, 1995, Keat filed a petition for rehearing in the court of appeal. Among the grounds raised was that the court's opinion contained a factual error with respect to the circumstances surrounding Mr. Chavez's firing of a weapon. Keat noted that the court's opinion characterized Mr. Chavez's conduct of firing the gun as "a misguided effort to get everyone's attention and stop the struggle." App. at 2. Keat observed that the record did not support the assertion made by the court of appeal since there was no evidence as to Mr. Chavez's state of mind at any time, let alone when he discharged the weapon. While there was testimony of two neighbors standing outside the house that at one point Mr. Chavez may have fired into the ceiling, it was clear from the jury's specific findings rejecting liability for excessive force and wrongful death, that it expressly rejected this version of what occurred. Had the jury believed the testimony of the two neighbors, it could not have found that the force used was reasonable, since it completely contradicted the testimony of the deputies as to the threat posed to them by Mr. Chavez. On June 8, 1995, the court of appeal denied the petition for rehearing. App. at 54.

E. The Petition For Review In The California Supreme Court.

On June 26, 1995, Keat filed a petition for review in the California Supreme Court. Among the issues presented was whether the jury's exoneration of Keat on the

excessive force claim under 42 U.S.C. § 1983 barred plaintiffs from recovering damages arising from Mr. Chavez's death and whether due process requires that a plaintiff produce evidence of a defendant's financial condition to support an award of punitive damages. App. at 92-94. On September 14, 1995, the California Supreme Court entered its order denying the petition for review. App. at 96.

Keat subsequently filed a motion requesting the court of appeal to stay issuance of remittitur pending disposition of a petition for writ of certiorari. The court of appeal denied the petition without prejudice to Keat requesting a stay of execution in the trial court. App. at 56. The remittitur issued on September 21, 1995. App. at 58.

WHY CERTIORARI SHOULD BE GRANTED

I.

REVIEW IS WARRANTED BECAUSE THE COURT OF APPEAL'S DECISION IMPOSING LIABILITY ON A POLICE OFFICER FOR INJURIES ARISING FROM THE USE OF FORCE NOTWITHSTANDING A JURY'S EXPRESS FINDING THAT THE FORCE WAS REASONABLE IS CONTRARY TO *GRAHAM V. CONNOR*, 490 U.S. 386 (1989) AND PRINCIPLES OF TORT LAW APPLICABLE TO ACTIONS UNDER 42 U.S.C. § 1983.

This petition raises an issue that is of vital importance to the safety of police officers throughout the country – the guidelines applicable to determining the scope of liability to be imposed on police officers for use of force during the course of execution of a search and apprehension of a suspect. By nature of their occupation, police officers are almost daily placed in circumstances

where, in the execution of a search warrant or in the pursuit of a suspect, they must enter a residence or other building. During the course of such activities, they are all too often confronted by the use of force, including deadly force, posing a threat to the officers and innocent bystanders. Worse yet, the decision to use force in self-defense must often be made within a split second with lives hanging in the balance. It is, very simply, the most difficult decision a law enforcement officer must make.

Petitioner Wesley Keat was forced to make such a decision. After illegally entering the residence of an individual whom he erroneously believed to be a suspect, Keat, along with his partner, was assaulted by members of the suspect's family, including the suspect's father, Crescencio Chavez, Sr. Although both officers were in uniform and at that point neither had their weapon drawn, Mr. Chavez went to another room, retrieved a handgun and began shooting at the officers, striking Keat's partner in the arm, and sending one bullet past Keat's head from a distance of only several feet. The officers returned fire, killing Mr. Chavez. Although a jury by special verdict found that Keat's use of force under the Fourth Amendment was reasonable, it nonetheless expressly awarded the Chavez family damages to compensate them for the death of Mr. Chavez, based upon the illegality of Keat's entry. Indeed, there was no evidence of damages resulting from the entry, other than Mr. Chavez's death. In affirming the judgment, the California Court of Appeal, Fourth Appellate District, Division Two, concluded that notwithstanding Deputy Keat's exoneration on the charge of excessive force, the jury could properly find that "but for" the illegal entry, Mr. Chavez would not have died and thus Keat could be held liable

for damages, including punitive damages in the amount of $100,000, for Chavez's death.

The net result of the court of appeal's decision is that an officer has been held liable for the use of *reasonable* force under the Fourth Amendment, indeed under circumstances where a jury found that he was justified in protecting himself and his partner from an unlawful assault. The court of appeal's decision flies in the face of the strict guidelines for determining use of force claims set by this Court in *Graham v. Connor*, 490 U.S. 386 (1989), raising the question whether the rules for imposing liability for use of force vary under the Fourth Amendment depending on whether force is applied during the course of an entry, search, or arrest. The decision also violates fundamental principles of tort law concerning independent intervening cause and privilege. In an area that demands clarity in order to assure the safety of police officers and members of the public, the court of appeal's decision has created chaos. To paraphrase Chief Justice Warren's invocation of Gilbert and Sullivan in *Pierson v. Ray*, 386 U.S. 547, 555 (1967), a policeman's lot is not a happy one. However, it is surely not so unhappy that an officer, even one who has illegally entered a home, may *reasonably* use force to defend himself or others from an unjustified and illegal attack, yet still find himself confronted by the daunting prospect of paying substantial compensatory and, even worse, punitive damages to his assailant or his assailant's heirs.

A. The Court Of Appeal's Decision That Liability For Use Of Force During The Course Of An Entry And Arrest May Arise From Violation Of Constitutional Provisions Other Than The "Seizure" Portion Of The Fourth Amendment Is Directly Contrary To This Court's Holding In *Graham v. Connor*.

In *Graham v. Connor*, this Court expressly held that an "excessive force claim aris[ing] in the context of an arrest or investigatory stop of a free citizen, . . . is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons . . . against unreasonable . . . seizures' of the person." 490 U.S. at 394. The Court expressly rejected the approach followed by several lower appellate courts which allowed claims for excessive force arising in the context of a detention or arrest to be analyzed under the more amorphous standards of substantive due process. *Id.* at 395. This was "[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive government conduct. . . . " *Id.*

Emphasizing that " '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' " the court enunciated general guidelines determining whether the use of force in a particular case was reasonable within the meaning of the Fourth Amendment, including "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." 490 U.S. at

396, citing *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). Moreover, the Court carefully recognized the dangerous and chaotic circumstances under which such decisions are inherently made, observing:

> "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . With respect to a claim of excessive force, the . . . standard of reasonableness at the moment applies: 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation."

490 U.S. at 396-397.

Thus, the Court articulated a straight-forward standard governing use of force claims arising during the course of an arrest: "[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." 490 U.S. at 397.

The jury here was expressly instructed on the *Graham* standards with respect to the plaintiffs' claims for use of excessive force. Indeed, the jury also received specific directions under California law with respect to the right of self-defense, both by Deputy Keat and by the late Mr. Chavez. The jury expressly found that Keat had not used excessive force. App. at 79, ¶ 13. In short, based upon the evidence presented, the jury found that Keat's actions were " 'objectively reasonable' in light of the facts and

circumstances confronting," him so as to foreclose liability arising from the use of force. However, based upon their express declarations, as well as the conspicuous lack of any evidence to award plaintiffs damages arising solely from the illegal search itself, as the court of appeal recognized, it is clear the jury awarded the plaintiffs $400,000 in compensatory damages and $100,000 in punitive damages based solely upon Mr. Chavez's death, concluding that had it not been for the illegal entry, the death would not have occurred. In upholding this award based upon a finding that the illegal entry was a "but for" cause of Mr. Chavez's death, the court of appeal departed from the specific standards enunciated in *Graham*.

First, the court departed from this Court's express command that evaluation of liability arising from the use of force be governed by the "standard of reasonableness at the moment. . . . " *Id.* at 396. Instead, under dubious principles of causation, the court shifted the focus to other, earlier purportedly unconstitutional conduct – the illegal entry itself as a catalyst for the use of force. This necessarily strips the use of force inquiry of its vital link to the events *contemporaneously* experienced by the officer at the time force is applied. While *Graham* expressly directs an officer's inquiry to the most basic and indeed fundamental circumstances that would justify use of force, i.e., the threat posed to the officer or to others by the suspect in question, the analysis employed by the court of appeal creates an open-ended scenario where the officer must worry not simply about the circumstances presented directly before him or her, but all preceding events – events that other than chronologically may have nothing to do with the officer's subsequent need to use force in the particular circumstances.

This evil is compounded by the fact that officers must routinely engage in a wide variety of conduct before being placed in a position where use of force may be necessary to defend themselves or others. One need only read the morning papers to see that, sadly enough, everything from a traffic stop to a simple request for identification may prompt an armed confrontation. Thus, instead of simply determining whether a particular suspect poses a threat to the officer or the public safety, or any of the other factors that fall within the broad umbrella of *Graham*, an officer must somehow make a split-second decision as to whether his or her earlier conduct meets constitutional scrutiny. This sort of hesitation may have deadly consequences, not simply for the officer, but for the general public.

Second, the court of appeal's decision ignores the fact that the "totality of the circumstances" test of *Graham*, by its very nature encompasses conduct preceding the actual use of force, including the circumstances which cause an officer to be put into a position to use force in the first place.

There is little question that liability may be imposed on a law enforcement officer for illegally entering a residence and that in some circumstances the nature of that entry may prompt an occupant to reasonably, but mistakenly, attempt to use force against the officer, thus making the officer's use of force unreasonable under *Graham*. Yet, that is not what occurred here. The jury specifically found that in light of all the circumstances, Deputy Keat reasonably used force to protect himself and his partner from the illegal unjustified attack by the late Mr. Chavez. Regardless of the legality of Keat's entry, Mr. Chavez did not have the right to retrieve a firearm and

attempt to kill the officers. Neither Keat nor any other officer should be forced to make the Hobson's choice between lawfully defending himself or his partner or paying substantial damages, including punitive damages which might not be subject to indemnification, simply because the officer may have made an initial mistake in entering the premises. *Graham* plainly forecloses such a result and this Court should grant certiorari to clarify and affirm the application of *Graham* in these circumstances.

B. The Court Of Appeal's Opinion Is Inconsistent With Basic Common Law Principles Of Tort Law Concerning Causation And Privilege.

The court of appeal's decision rested on the premise that but for Deputy Keat's illegal entry into the home, Mr. Chavez would not have retrieved a pistol and attempted to shoot Keat and his partner Deputy Ammar, thus leading the officers to return fire and kill him. The court found that the jury could properly determine that Mr. Chavez's death was caused both by Keat's use of force, and by what it described as the more "remote" cause, Keat's illegal entry. App. at 9. Yet, the court of appeal's analysis is contrary to basic principles of tort law concerning causation and, more particularly, independent intervening acts.

This Court has held that actions brought under 42 U.S.C. § 1983 are governed by general tort principles. *Monroe v. Pape*, 365 U.S. 167, 187 (1961), *overruled in part, Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). Thus, while the Court has held that liability may be imposed on a defendant whose acts set in motion a chain of events leading to a constitutional violation, consistent with general tort principles it has drawn a distinction

between "but for" and "legal" or "proximate" causation for purposes of imposing liability under § 1983. In *Martinez v. California*, 444 U.S. 277 (1980), the plaintiffs sued various State defendants under § 1983, asserting that they had improperly released a dangerous parolee into plaintiffs' neighborhood where he subsequently killed their daughter. Although tacitly recognizing that "but for" the officials' decision to release the prisoner, the attack would not have occurred, the Court declined to find legal causation, noting that the defendant's alleged misconduct – the release – occurred months before the subsequent attack. Thus, defendant's actions were too "remote" in order to establish causation. 444 U.S. at 285.

The lower federal courts have not hesitated to apply the independent intervening act doctrine when appropriate to cut off causation liability under section 1983. For example, in *Smiddy v. Varney*, 665 F.2d 261 (9th Cir. 1981), *cert. denied*, 459 U.S. 829 (1982), the court cut off the defendant police officer's liability for malicious prosecution finding that a prosecutor's independent decision to file charges acted as an intervening superseding cause of the prosecution. 665 F.2d at 266-267. Other circuits have followed *Smiddy*'s lead and embraced a rule cutting off an officer's liability for malicious prosecution and wrongful arrest based upon a prosecutor's or grand jury's independent decision to file charges. See *Barts v. Joyner*, 865 F.2d 1187, 1195 (11th Cir. 1989) ["The intervening acts of the prosecutor, grand jury, judge and jury – assuming that these court officials acted without malice that caused them to abuse their powers – each break the chain of causation unless plaintiff can show that these intervening acts were the result of deception or undue pressure by

the defendant policemen"], *cert. denied*, 493 U.S. 831; *Duncan v. Nelson*, 466 F.2d 939 (7th Cir. 1972); *Hand v. Gary*, 838 F.2d 1420 (5th Cir. 1988); *cf., Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988) [decision of prosecutor does not cut off officer liability if decision based upon officer's intentional submission of false information].

The use of unlawful force against an officer, like the decision of a prosecutor to file charges, necessarily constitutes an independent act cutting off the officer's liability for any injury resulting from protecting himself or the public from such an assault. Just as public policy dictates that the prosecutor's decision be deemed independent despite the "but for" link between an arrest by an officer and the filing of charges, so too does it mandate that an unlawful assault against a law enforcement officer be deemed independent, even if other, improper conduct of the officer may have been a "but for" cause of the attack. Virtually every state, as well as the federal government, imposes liability for assault on a law enforcement officer. Indeed, in no state is protection of property a complete defense to a charge of murder or attempted murder. Similarly, use of deadly force to protect property has not been proper as a matter of civil law since the 19th Century and the era of spring guns. *See* W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 21, at 132-33 (5th ed. 1984) ["[I]t is the accepted rule that there is no privilege to use any force calculated to cause death or serious bodily injury to repel the threat to land or chattels, unless there is also such a threat to defendant's personal safety"].

This is not a case of a homeowner protecting himself or his family from a deadly assault by police officers. Although the plaintiffs all alleged that they individually

had been the subject of unreasonable force by Deputy Keat and Deputy Ammar during the course of the search – that the deputies were assaulting them – the jury expressly rejected those claims and found that the officers had not used excessive force. App. at 79. The jury clearly believed the officers' account that upon entering they simply attempted to take Crescencio Chavez, Jr., into custody and were largely protecting themselves from the assaults of the various family members. Based on the jury's finding, Mr. Chavez's retrieval of a weapon and firing upon the officers was not prompted by any *reasonable* apprehension that his family was in danger, but simply his anger at the presence of police officers on his property. However understandable such anger might be, it is not acceptable to express it by attempting to slay two uniformed officers who present no physical threat to either the members of the household or to the homeowner himself. In sum, finding that Mr. Chavez's use of a firearm under the circumstances was not an independent cause cutting off liability expressly sanctions his use of force under the circumstances, a result that is squarely at odds with established principles of criminal and tort law. To put it succinctly, that an officer may illegally enter your home does not, without something more, give you the right to shoot him. Yet that is plainly the implication of the court of appeal's decision here since under the circumstances an officer could use force to defend himself from such a deadly attack only at the price of substantial civil liability.

Moreover, the court of appeal's analysis is at odds with common law principles concerning the privilege of self-defense. *See* Prosser, et al., *supra*, § 19, at p. 124 ["The privilege . . . rests upon the necessity of permitting a

person who is attacked to take reasonable steps to prevent harm to himself or herself. . . . "]. Deputy Keat was not required to allow Mr. Chavez to shoot him, simply because he had mistakenly entered the residence. Indeed, this accepted common law principle is embraced within the general *Graham* standards which clearly allow an officer to meet force with force.

It simply cannot be that once a police officer illegally enters a residence, he or she may be assaulted with impunity and self-defense employed only at the risk of potentially devastating civil liability. Upon making a mistake, an officer should not be put to the choice of attempting to defend himself, other officers, or even innocent bystanders simply because of fear of civil liability stemming from earlier inadvertent, although unconstitutional, conduct. No compelling public policy is served by such a result and indeed the danger presented to police officers and to members of the public is manifest.

Because the court of appeal's decision is contrary to principles governing liability spelled out by this court in *Graham* and *Martinez*, certiorari is clearly warranted.

II.

REVIEW IS WARRANTED BECAUSE THE RULE APPLIED BY THE FEDERAL COURTS AND A MAJORITY OF STATES SHIFTING THE BURDEN OF PROOF TO A DEFENDANT TO INTRODUCE EVIDENCE OF FINANCIAL CONDITION IN ORDER TO AVOID AN UNCONSTITUTIONALLY DESTRUCTIVE PUNITIVE DAMAGE AWARD VIOLATES DUE PROCESS.

In the trial court, petitioner Keat declined to present evidence concerning his personal financial condition with respect to plaintiff's claim of punitive damages. Keat

argued that the California Supreme Court's decision in *Adams v. Murakami*, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991), required plaintiff to introduce evidence of Keat's financial condition in order to establish a claim of punitive damages both with respect to plaintiff's state law claims, as well as the federal claims that plaintiff had elected to bring in state court. Following the jury's award of punitive damages, Keat filed a motion for new trial based upon plaintiff's failure to introduce evidence of his financial condition.[5] Plaintiffs in turn argued that since they had only recovered damages on their federal claim under § 1983, then the federal common law rule which required a defendant to introduce evidence of financial condition in order to mitigate any punitive damage award necessarily controlled the action. *See, e.g., Woods-Drake v. Lundy*, 667 F.2d 1198, 1203 n.9 (5th Cir. 1982); *Tri-Tron Int. v. Velto*, 525 F.2d 432, 438 (9th Cir. 1975). On appeal, Keat again argued that under *Adams* he was not required to introduce evidence of financial condition, and that imposing such a burden on a defendant violated due process. In affirming the judgment, the court of appeal rejected the contention, finding that under this Court's decision in *Pacific Mut. Life Ins. v. Haslip*, 499 U.S. 1

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[5] The court of appeal twice seemingly takes Keat to task for not offering evidence of his financial condition at trial or in his motion for new trial. (App. at 24, n.5.) Obviously, it was Keat's point that *Adams* did not require him to put on such evidence at *trial*, and California law bars its presentation *on motion for new trial*. See Proc. Code Civ. § 658 [noting that new trial motions for excessive damages may only be made on minutes of the court, not declaration] and § 657(4) [evidence must be newly *discovered*].

(1991), the federal common law scheme met the requirements of due process. *See* App. at 15-17.

Review of the controlling decisions of this Court reveals that the common law rule embraced by the federal courts, and by the majority of state courts[6] concerning a defendant's burden to introduce evidence of financial condition to minimize a punitive damage award, violates fundamental principles of due process. As we discuss, given the widespread implication of this rule, as well as its manifest deficiencies, it is necessary for this Court to grant certiorari and bring the federal courts, as well as a majority of state courts, in line with the principles of due process.

As Justice Ginsburg has observed, a majority of the Court has "agreed that a punitive damage award may be so grossly excessive as to violate the Due Process Clause." *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2343 (1994) (Ginsburg, J., dissenting), citing *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2718-2719 (1993). It is for this reason that evidence of a defendant's financial condition is a necessary element to determining whether or not a punitive award is constitutionally valid,

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[6] *See Adams v. Murakami*, 54 Cal. 3d at 128, 284 Cal. Rptr. at 333, 813 P.2d at 1363, citing *Smith v. Lightning Bolt Prods., Inc.*, 861 F.2d 363, 373 (2d Cir. 1988) [applying New York law]; *Tolliver v. Amici*, 800 F.2d 149, 151 (7th Cir. 1986) [applying Illinois law]; *Anderson v. Latham Trucking Co.*, 728 S.W.2d 752, 754 (Tenn. 1987); *Fahrenberg v. Tengel*, 291 N.W.2d 516, 527 (Wis. 1980); *Rinaldi v. Aaron*, 314 So. 2d 762, 765 (Fla. 1975); *Poeta v. Sheridan Point Shopping Plaza Partnership*, 522 N.E.2d 1248, 1251 (Ill. App. Ct. 1990); *Elam v. Alcolae, Inc.*, 765 S.W.2d 42, 223-225 (Mo. App. Ct. 1988), *cert. denied*, 493 U.S. 817 (1989); *see also C&C Trucking Co. v. Smith*, 612 So. 2d 1092, 1104-1105 (Miss. 1992).

since an award that was not simply punitive but destructive would go beyond a state's power under the Due Process Clause. *Cf., Haslip,* 499 U.S. at 21 [Alabama scheme for appellate and post-trial review of punitive damage award in light of impact on defendant and other factors "ensure[s] that the award does 'not exceed an amount that will accomplish society's goals of punishment and deterrence' "]; *see also, Browning-Ferris Indus. v. Kelco Disposal, Inc.,* 492 U.S. 257, 280-281 (1989) (Brennan, J. concurring) ["Several of our decisions indicate that even where a statute sets a range of possible civil damages that may be awarded to a private litigant, the Due Process Clause forbids damages awards that are 'grossly excessive', or 'so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable' " [quoting *Waters-Pierce Oil Co. v. Texas,* 212 U.S. 86, 111 (1909) and *St. Louis, I. M. & S. Ry. v. Williams,* 251 U.S. 63, 66-67 (1919)] [citing *Southwestern Tel. & Tel. Co. v. Danaher,* 238 U.S. 482, 491 (1915); *Missouri Pac. Ry. Co. v. Humes,* 115 U.S. 512, 522-523 (1885)].

Since due process principles squarely foreclose a state from imposing a destructive punitive damage award, the question then becomes which party must bear the burden of presenting evidence sufficient to demonstrate that the award is either constitutional or unconstitutional. Petitioner submits that this Court's decisions concerning imposition of the burden of proof on substantive civil claims as well as criminal liability require that a plaintiff seeking to obtain an award of punitive damages establish the constitutional sufficiency of the award.

While the Court has noted "[o]utside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal

constitutional moment," *Lavine v. Milne*, 424 U.S. 577, 585 (1976), it has drawn the line at state schemes that improperly shift the burden to a defendant in a civil case of proving facts sufficient to avoid liability. Thus, in *Western and Atl. R.R. v. Henderson*, 279 U.S. 639 (1929), the Court struck down a Georgia statute creating a presumption of liability on a railroad for injuries arising from accidents at railroad crossings, finding that the statutory presumption ran afoul of due process. The Court noted that:

> "The mere fact of collision between a railway train and a vehicle at a highway grade crossing furnishes no basis for any inference as to whether the accident was caused by negligence of the railway company, or of the traveler on the highway, or of both, or without fault of anyone. Reasoning does not lead from the occurrence back to its cause."

279 U.S. at 642-643.

A scheme which imposes the burden on a defendant to introduce evidence of financial condition to demonstrate that a punitive damage award is destructive and hence unconstitutional, is nothing more than essentially a presumption that an award of punitive damages is constitutional, i.e., not destructive. Yet, this presumption, like that in *Western and Atlantic Railroad*, bears no relationship to the facts that a plaintiff initially presents and proves in order to obtain the punitive damage award. Quite simply, that a plaintiff convinces a jury that a defendant's conduct is wanton, malicious or reckless, does not permit the inference that a defendant has the financial wherewithal to pay an award without being financially destroyed. In short, the presumption of constitutional validity of the award is without factual foundation. As the Court observed in *Honda Motor Co.*:

> "What we are concerned with is the possibility that a guilty defendant may be unjustly punished; evidence of guilt warranting *some* punishment is not a substitute for evidence providing at least a rational basis *for the particular deprivation of property imposed by the State to deter future wrongdoing.*"

114 S. Ct. at 2339 (emphasis added).

Thus, the complete absence of any evidence establishing the validity of the amount of an award as to a particular defendant clearly raises substantial due process problems. Moreover, as a general matter, the Court has held that a state cannot impose the burden of proof on an individual to establish his or her entitlement to a particular constitutional right. In *Speiser v. Randall*, 357 U.S. 513, the Court struck down a provision of the California Constitution which conditioned the receipt of a tax exemption on the taxpayer's signing a statement declaring that he or she did not advocate, and was not a member of an organization, "which advocat[ed] the overthrow of the government of the United States or the State by force or violence or other unlawful means." 357 U.S. at 516. The Court found that the statutory scheme violated due process by requiring the taxpayer to bear the burden of proving that speech and conduct fell within the protection of the Constitution in order to avoid what amounted to a tax penalty. 357 U.S. at 525-527. Similarly, a defendant has a substantive due process right under the Constitution not to be subjected to a destructive punitive damage award, and that right cannot be conditioned upon defendant bearing the burden of presenting evidence to rebut what essentially constitutes a presumption that the award does not impinge that right.

This Court has also made it clear that a state cannot impose a penalty that is otherwise unconstitutional simply by creating a presumption and then shifting the burden to the defendant to avoid the unconstitutional result. In *Bailey v. Alabama*, 219 U.S. 219 (1911), the Court struck down an Alabama criminal statute that created a presumption that an employee who left his employment prior to expiration of his employment contract had entered into the contract with fraudulent intent, thus allowing imposition of a criminal sentence. The Court noted that the Constitution clearly prohibited a state from imprisoning someone simply for leaving an employer and working elsewhere. The state could not escape this prohibition by creating a statutory presumption, even one that might be rebutted by the defendant's submission of evidence: "[W]here the conduct or fact, *the existence of which is made the basis of the statutory presumption*, itself falls within the scope of a provision of the Federal Constitution, a further question arises. It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions." 219 U.S. at 239. Here, as well, the Constitution clearly prohibits the imposition of a destructive punitive damage award and, as in *Bailey*, this prohibition "cannot be transgressed indirectly by the creation of a . . . presumption," even one that may be rebutted.

The court of appeal asserted that requiring a defendant to present evidence of financial condition in order to avoid a destructive punitive damage award was consistent with this Court's decisions upholding the rights of

states to require defendants to introduce evidence of mitigating circumstances in order to reduce criminal liability, citing *Patterson v. New York*, 432 U.S. 197 (1977) and *Morrison v. California*, 291 U.S. 82 (1934). App. at 17. Yet, the court of appeal opinion misses the essential point. As this Court determined in *Patterson*, when a criminal defendant attempts to introduce evidence of mitigating circumstances, it is to receive the lesser of various punishments – all of which may be constitutionally imposed once the prosecutor produces evidence to establish the crime in question. *See, Patterson*, 432 U.S. at 207-208 ["[t]he Due Process Clause . . . does not put New York to the choice of abandoning . . . [affirmative] defenses or undertaking to disprove their existence in order to convict of a crime which otherwise is within its constitutional powers to sanction by substantial punishment"]. In contrast, here, the very question at issue is whether the punishment itself – the punitive damage award – *is constitutional in the first instance* – i.e., not destructive.

The rule embraced by the federal courts and the majority of states requiring a defendant to introduce evidence of financial condition in order to avoid a destructive punitive damage award creates an invalid presumption under the decisions of this Court. Because this rule affects virtually every punitive damage claim brought in federal courts, as well as the bulk of punitive damage claims brought in state courts, it is vital that this Court grant certiorari to end a practice that is offensive to fundamental principles of due process.

CONCLUSION

For the foregoing reasons, petitioner submits the petition for certiorari should be granted.

Dated: December 7, 1995

Respectfully submitted,

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CERTIFIED FOR PARTIAL PUBLICATION*

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

MARIA DE LA LUZ CHAVEZ, et al., Plaintiff and Respondent, v. WESLEY KEAT, Defendant and Appellant.	)))))))	E011952 (Super.Ct.No. I-47976) **OPINION** (Filed May 15, 1995)

APPEAL from the Superior Court of Riverside County. Eugene Bishop, Judge. Affirmed.

Kinkle, Rodiger & Spriggs, Bruce Disenhouse, Greines, Martin, Stein & Richland, Timothy T. Coates and Carolyn Oill for Defendant and Appellant.

Burton C. Jacobson for Plaintiffs and Respondents. Wesley Keat, a Riverside County Deputy Sheriff, appeals from a judgment entered against him on claims made pursuant to 42 U.S.C. section 1983 ("section 1983") for compensatory and punitive damages, and from a post-judgment order awarding attorney's fees. We affirm.

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*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts A, B.3., and C.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 6 p.m. on November 8, 1985, Keat was on patrol when he responded to a dispatch concerning a verbal argument between two males inside a particular residence in Thermal. On his arrival, he observed two males, Crescencio Chavez, Jr. ("Chavez") and an unrelated neighbor, in the front yard of the Chavez residence, which is next door to the residence mentioned in the dispatch. Keat recognized that the addresses were different; nevertheless, when the two males went into the Chavez residence, Keat followed them into the house without knocking or announcing his presence.

Keat was met at the door by Chavez's father, Crescencio Chavez, Sr. ("Mr. Chavez"). Keat pulled Chavez and his young son, Steven Chavez, out of a bathroom and down the hall into the living room. At that time a second officer, John Ammar, arrived at the house and came through the door into the living room. A struggle ensued involving Keat, Ammar, Chavez, Chavez's mother, Maria de la Luz Chavez ("Mrs. Chavez"), and Steven. During the midst of that struggle, Mr. Chavez left the room and returned with a gun. In what may have been a misguided effort to get everyone's attention and stop the struggle, Mr. Chavez fired the gun. Keat and Ammar responded by shooting Mr. Chavez at least six times, killing him.

Chavez, Mrs. Chavez, Steven, and the administrator of the estate of Mr. Chavez ("Chavez Estate") sued Keat, Ammar, and the County of Riverside under state law for damages for wrongful death and other torts, and under section 1983 for the violation of their civil rights. After the trial, the jury returned nine separate verdicts, each

dealing with a different claim or groups of claims brought by a different plaintiff or group of plaintiffs.[1] The jury also made 16 "Special Findings."

The jury rejected all claims against Ammar and the County of Riverside, and rejected all claims against Keat on the state law tort claims. The only claims which the jury decided in favor of the plaintiffs were those alleging that Keat had violated the plaintiffs' civil rights, i.e., those brought "under federal law for excessive force, illegal seizure, and illegal search. . . . " To Mrs. Chavez, the jury awarded $400,000 in compensatory damages and $100,000 in punitive damages; to the Chavez Estate, $6,200 in compensatory damages; and to Chavez and Steven, nominal compensatory damages of $1 apiece. After entry of judgment, the trial court granted the plaintiffs' motion for attorney fees.

CONTENTIONS

Keat contends (1) that the compensatory damage awards in favor of Mrs. Chavez and the Chavez Estate are not supported by substantial evidence, (2) that the punitive damage award is excessive or violates due process,

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[1] "A general verdict is that by which [the jury] pronounce[s] generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find[s] the facts only, leaving the judgment to the court." (Code Civ. Proc., § 624.) None of the verdicts here purported to merely find the facts; instead, each found for or against the plaintiffs on a particular claim or group of claims, and when in favor of the plaintiffs, awarded damages. Thus, although each of the verdicts is denominated a "Special Verdict," according to the statutory definition they are general verdicts.

and (3) that the attorney's fee award entered after judgment must therefore be redetermined.

DISCUSSION

A. THE COMPENSATORY DAMAGE AWARDS

In addition to the general verdict in favor of Mrs. Chavez and the Chavez Estate on their civil rights claims, the jury made a number of related special findings. In particular, the jury found that the defendants had not falsely arrested or imprisoned either Chavez or Mrs. Chavez, had not violated the civil rights of any of the plaintiffs by using excessive force, and had not "wrongfully cause[d] the death" of Mr. Chavez. However, the jury did find that the officers had "unreasonably" entered and searched the Chavez home.

Keat argues that the compensatory damage awards to Mrs. Chavez and the Chavez Estate should be reduced to nominal awards. In doing so, he first contends that the effect of the special findings is to limit the basis for the verdict on the civil rights claims to Keat's illegal entry into the house, as opposed to excessive force, illegal arrest, or the death of Mr. Chavez. Second, Keat asserts that there is insufficient evidence of any damages suffered by Mrs. Chavez or to the Chavez Estate as the result of the illegal entry to support the compensatory damages awarded to them of $400,000 and $6,200, respectively. He concludes that since there is no evidence of actual injury resulting from the illegal entry, those awards must be reduced to nominal damages.

The analysis of this argument involves two separate questions. First, given the existence of the special findings, what is the proper interpretation of the verdict? Second, as properly interpreted, is the verdict supported by substantial evidence?

1. The Interpretation of the Verdict

"Where a special finding of facts is inconsistent with the general verdict, the former controls the latter. . . . " (Code Civ. Proc., § 625.) Accordingly, the first step in interpreting a verdict which is accompanied by special findings is to determine whether there is any inconsistency between them.

In answering that question, the verdict and findings are construed, if possible, in a manner which will give effect to the verdict. " 'No presumption will be indulged in favor of answers of the jury to special interrogatories as against the general verdict; but, on the contrary, every reasonable intendment in favor of the general verdict should be indulged, and all parts of the verdict are to be reconciled in support thereof if it can reasonably be done. Hence, the general verdict will stand unless the facts found by the jury in answer to special interrogatories are so clearly antagonistic to it as to be absolutely irreconcilable, . . . so that both the general verdict and special findings cannot stand.' " (*Law v. Northern Assurance Co.* (1913) 165 Cal. 394, 406; *Weisenburg v. Molina* (1976) 58 Cal.App.3d 478, 487.) "The general and special verdicts must be beyond possibility of reconciliation under any possible application of the evidence and instructions. If any conclusions could be drawn thereunder which would

explain the apparent conflict, the jury will be deemed to have drawn them." (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 540-541.)

Here, as Keat concedes, even when the general verdict is given the narrow interpretation which he ascribes to it, it is not entirely irreconcilable with the special findings. Although the jury found no unlawful arrest, excessive force, or wrongfully caused death, it did find that the entry into the home had been unreasonable. Therefore, by assuming that the jury based its verdicts upon that illegal entry, the verdict in favor of the plaintiffs on the civil rights claim is consistent with the special findings.

However, as Keat notes, there is no evidence that either Mrs. Chavez or the Chavez Estate suffered actual injury solely from the illegal entry. To the contrary, all of the evidence concerns injuries suffered as a result of the death of Mr. Chavez or, to a lesser extent, from the force used by the officers against Mrs. Chavez at the time of the arrest. The question, therefore, is whether Keat is correct when he argues that the special findings must be interpreted in a way which forecloses any recovery of damages in compensation for those injuries.

The finding that Keat did not "wrongfully cause the death" of Mr. Chavez can be interpreted two ways. Most directly, it suggests that Keat's act of shooting Mr. Chavez, which was undeniably a proximate cause of his death, was justified and thus not wrongful. However, because the finding was not specifically limited to a particular claim, and because no jury instruction was given to explain the nature of the question asked in that

special interrogatory, it is susceptible to a broader meaning as well: i.e., that the death of Mr. Chavez had not been proximately caused by any wrongful act by Keat. Adopting this latter interpretation, Keat concludes that although the jury found that his entry into the Chavez residence was wrongful, it also found that the entry did not proximately cause Mr. Chavez's death.

We reject the second, broader interpretation of the jury's special finding, for three reasons. First, ambiguous special findings are to be narrowly construed if necessary to support the verdict. " 'Obscurities and apparent inconsistencies are to be given weight in favor of rather than against the general verdict. If the findings are open to double construction, that construction will be adopted which upholds the general verdict. A general verdict upon issues and evidence properly submitted is presumed to have decided every fact or deduction therefrom essential to support it, while a special finding must be limited and controlled by its specific terms.' " (*Spear v. United Railroads* (1911) 16 Cal.App. 637, 654-655.) Thus, given a choice between a broad construction of the special finding which would cause the general verdict to be unsupported by substantial evidence, and a narrower construction of the finding which would give effect to the verdict, we must choose the latter.

Second, under the record before us, there is no doubt that the jury found that, contrary to the interpretation urged by Keat, the plaintiffs should be compensated for the damages resulting from the death of Mr. Chavez. Following the verdict, Keat moved for a new trial on the basis of declarations from several jurors which state that the jurors expressly agreed among themselves that the

compensatory damage award in favor of Mrs. Chavez would be calculated by multiplying $25,000 per year times Mr. Chavez's life expectancy of 16 years. "We arrived at the $25,000 per year figure by discussing and then verbally agreeing that said figure represented the yearly loss of income and support suffered by reason of Mr. Chavez's death." As to the Chavez Estate, the jury "agreed that the damages would consist of the funeral expenses and medical treatment bills incurred with respect to the decedent. . . ."[2]

In short, the juror declarations indicate that the compensatory damages awarded to Mrs. Chavez and the Chavez Estate were designed by the jury to compensate the plaintiffs for damages flowing from the death of Mr. Chavez. That intent is frustrated unless the special finding is restricted to the narrower construction.

Third, a finding that the shooting of Mr. Chavez was justified does not foreclose the conclusion that his death was proximately caused by the earlier, wrongful entry. Injurious events do not necessarily have only a single

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[2] Despite Evidence Code section 1150, evidence of a discussion and express agreement to calculate a damage award in a particular fashion is admissible to impeach a verdict on the basis of jury misconduct, because the agreement is an overt act which is objectively verifiable and subject to corroboration. (*Krouse v. Graham* (1977) 19 Cal.3d 59, 80-81.) We need not decide whether such evidence was properly admitted in this instance, because any objection to admissibility for that purpose has been waived by the failure of the plaintiffs to object either in their written opposition to the motion for new trial or at the hearing on that motion. (Evid. Code, § 353.)

cause. To the contrary, a particular injury may have multiple causes, each of which is considered to be a proximate cause. For instance, a gunshot wound which was directly caused by one person (e.g., the person who fired the gun) may have also been proximately caused, albeit less directly, by another person (e.g., the person who negligently entrusted the first person with a weapon).

By the same token, the damages suffered by the plaintiffs may have had multiple causes. Here, the jury apparently concluded that the death of Mr. Chavez and the damages that resulted from it had at least two proximate causes: Keat's shooting of his weapon and Keat's entry into the house. That it concluded that the more direct cause was not wrongful, and thus did not carry liability for the resulting injuries, did not prevent it from concluding that the more remote cause was wrongful and did result in liability.

For all of these reasons, we conclude that the finding that Keat did not "wrongfully cause the death" of Mr. Chavez does not constitute a finding that his death was not proximately caused by the wrongful entry into the house.

2. Substantial Evidence

There is ample evidence that Keat entered the house illegally, that he thereafter shot Mr. Chavez, that Mr. Chavez died as the result of those wounds, and that his survivors and estate suffered damages as a result. Whether those damages were proximately caused by the illegal entry is a question of fact for the jury. (*Hoyem v.*

Manhattan Beach City Sch. Dist. (1978) 22 Cal.3d 508, 520.) Since the special findings do not foreclose a finding that the death of Mr. Chavez proximately resulted from the wrongful entry, and since such a finding would be consistent with the verdict, the existence of such a finding may be implied from the jury's verdict. From the evidence, the jury may have concluded that, under the circumstances, the officers were justified in firing at and killing Mr. Chavez, but that Keat was at fault for creating those circumstances in the first place by entering the residence illegally. We cannot say that the jury's implied findings on that issue are unsupported by the evidence. Accordingly, there is nothing improper in concluding that Keat should compensate Mrs. Chavez and the Chavez Estate for losses they suffered as the result of Mr. Chavez's death.

The cases relied upon by Keat as authority for the opposite conclusion are not on point. In *George v. City of Long Beach* (9th Cir. 1992) 973 F.2d 706, the court held that a plaintiff who was shot after a warrantless entry into his apartment was entitled only to nominal damages. (*Id.*, p. 708.) There, however, the jury had found that the plaintiff's injuries were not caused by the illegal entry. (*Ibid.*) Here, the jury impliedly found the opposite. Just as the *George* court refused to upset the jury's factual finding regarding causation (*id.*, p. 709), we cannot do so here.

Similarly, *Smiddy v. Varney* (9th Cir. 1981) 665 F.2d 261 is factually distinguishable. It holds that the officers who negligently arrested the plaintiff could be liable for damages resulting from his arrest, but not for those accruing after the filing of a criminal complaint by the district attorney. (*Id.*, pp. 266-267.) As the court explained, the

"[f]iling of a criminal complaint immunizes investigating officers . . . from damages suffered thereafter because it is presumed that the prosecutor filing the complaint exercised independent judgment in determining that probable cause for an accused's arrest exists at that time." (*Id.*, p. 266.) That rule has no application here, where the decedent was shot before he could be arrested, much less charged.

Nor does former Probate Code section 573 render the compensatory damage award in favor of the Chavez Estate unsupported. As noted, the jury calculated the $6,200 award to the estate on the basis of Mr. Chavez's "funeral expenses and medical treatment bills. . . . " However, under California law, the damages recoverable in a survival action "are limited to the loss or damage the decedent sustained or incurred prior to death. . . . " (Former Prob. Code, § 573, subd. (c); see now Code Civ. Proc., § 377.34.) Thus, Keat argues that the only damages arguably recoverable by the estate are those for ambulance charges ($503.95) and emergency room charges ($1,200), for a total of $1,703.95. While additional evidence was admitted regarding the payment of funeral expenses, cemetery expenses, burial clothing, and flowers, he contends that that evidence cannot support a damage award greater than $1,703.95 because none of those expenses are recoverable by the estate.

This argument, however, presupposes that California survival statutes can limit the recovery obtained under federal law on a civil rights claim. While upholding the applicability of state statutory restrictions with respect to the survival of a civil rights action brought by a plaintiff who dies during the pendency of the action, the Supreme

Court expressly left open the question of "whether abatement based on state law could be allowed in a situation in which deprivation of federal rights caused death." (*Robertson v. Wegmann* (1978) 436 U.S. 584, 594 [98 S.Ct. 1991, 1997].)

Those courts which have addressed the issue have held that state survival statutes cannot prevent recovery of adequate compensation in those instances. (E.g., *Bell v. City of Milwaukee* (7th Cir. 1984) 746 F.2d 1205, 1236-1240 [refusing to apply Wisconsin survival statute]; *Davis v. City of Ellensburg* (E.D.Wash. 1987) 651 F.Supp. 1248, 1256 [refusing to apply Washington survival statute].) In particular, it has been said "that California's survival statute, insofar as it excludes recovery for pain and suffering, is inconsistent with § 1983. Its restrictions on recovery are significantly inhospitable to the policies fostered by the [Civil Rights] Act. [¶] To deny recovery for pain and suffering would strike at the very heart of a § 1983 action. The same result should apply to out-of-pocket expenses such as medical, funeral, and burial expenses." (*Guyton v. Phillips* (N.D.Cal. 1981) 532 F.Supp. 1154, 1166.)

Accordingly, damages may be awarded to the Chavez Estate which exceed the limitations of the California survival statute. The evidence of expenses concerning medical treatment and the funeral are sufficient to support an award of $6,200, the amount of the compensatory damage award to the estate.

B. THE PUNITIVE DAMAGE AWARD

The purpose of punitive damages is not to destroy the defendant (*Adams v. Murakami* (1991) 54 Cal.3d 105, 112), but "to penalize wrongdoers in a way that will deter them and others from repeating the wrongful conduct in the future" (*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 790). "[T]he function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. [Citations.] By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928; *Adams*, p. 110.) Thus, "a punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Id.*, p. 112.)

On appeal, we review punitive damage awards to determine whether they are excessive. (*Adams*, pp. 109-110.) However, "[a] reviewing court cannot make a fully informed determination of whether an award of punitive damages is excessive unless the record contains evidence of the defendant's financial condition." (*Id.*, p. 110.) Therefore, *Adams* established the rule in California that if there is no such evidence in the record, the award of punitive damages is excessive as a matter of law and must be reversed. (*Id.*, pp. 114-115.) In addition, *Adams* imposes the burden of producing that evidence on the plaintiff. (*Id.*, p. 119.)

However, the view adopted in California by *Adams* is not universally held. The federal courts "reject the

defendants' contention that evidence of their financial status was a prerequisite to the imposition of punitive damages. Although the wealth of the defendant . . . may be relevant to the imposition of punitive damages, [citations], it can hardly be said that the defendants' financial status was an element of plaintiffs' cause of action to be proved before punitive damages could be awarded." (*Bennis v. Gable* (3d Cir. 1987) 823 F.2d 723, 734, fn. 14.)

Instead, under federal law "it is defendant, and not plaintiff, who must carry the burden of introducing evidence of net worth if defendant wishes these facts to be considered in awarding punitive damages." (*Woods-Drake v. Lundy* (5th Cir. 1982) 667 F.2d 1198, 1203, fn. 9.) If, despite notice of the plaintiff's claim for punitive damages, a defendant makes no effort to satisfy that burden, "punitive damages shall be awarded despite incomplete knowledge of defendant's financial position." (*Ibid.*; accord, *Zarcone v. Perry* (2d Cir. 1978) 572 F.2d 52, 56, and cases therein cited; but see *Keenan v. City of Philadelphia* (3d Cir. 1992) 983 F.2d 459, 482, fn. 9 (conc. & dis. opn. of Higginbotham, J.) [listing cases supporting opposite rule].)

At trial, neither the plaintiffs nor Keat introduced any evidence of his financial condition. After the verdict, Keat moved for a new trial on the ground, inter alia, that the punitive damage award was excessive because of the absence of such evidence at trial. However, he did not support his motion with any evidence that the award was disproportionate to his ability to pay. Nor did the plaintiffs oppose that motion with any evidence of Keat's assets.

Despite his failure to avail himself of the opportunity to offer evidence of his supposedly limited financial means, Keats argues that the punitive damage award must be reversed, for three reasons. First, he contends that an award of punitive damages against a defendant violates federal constitutional due process guaranties unless evidence of the defendant's financial condition is introduced and unless the burden of producing that evidence is on the plaintiff. Second, he argues that the rule of *Adams v. Murakami, supra,* is a rule of procedure which controls the prosecution of a federal cause of action in a California court. Third, he claims that the standard of review utilized by California courts when assessing the excessiveness of punitive damage awards lacks the objective standards necessary to ensure due process.

1. Evidence of Keat's Financial Condition Is Not Required By the Fourteenth Amendment.

Keat's first contention is incorrect. While he claims that the rules in *Adams v. Murakami, supra,* "rest on due process principles," the Supreme Court expressly based them instead on state common law. "The question before us is one of state law. . . . " (*Id.*, p. 116.) "We need not decide, and do not decide, whether evidence of a defendant's financial condition is a *constitutional* prerequisite . . . to an award of punitive damages." (*Id.*, 54 Cal.3d at p. 118.)

Moreover, *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1 [113 L.Ed.2d 1] (*"Haslip"*), the controlling United States Supreme Court authority on this issue, is contrary

to Keat's contention. There, the Supreme Court upheld against a due process attack the Alabama procedures regarding punitive damage awards. Unlike California, Alabama *forbids* the introduction of evidence of the defendant's wealth at trial. (*Id.*, p. 19 [113 L.Ed.2d at p. 21]; *Southern Life & Health Ins. Co. v. Whitman* (Ala. 1978) 358 So.2d 1025, 1026-1027.) If such evidence were constitutionally required to support a punitive damage award, the Supreme Court could not have affirmed the judgment.

Instead, the Supreme Court relied upon the existence of post-verdict procedures for reviewing a jury's discretion in setting the amount of punitive damages. (*Haslip*, pp. 20-22 [113 L.Ed.2d at pp. 21-22].) Alabama law, it noted, provides that punitive damage verdicts may be challenged as excessive in a motion to the trial court. (*Id.*, p. 20, citing *Hammond v. Gadsden* (Ala. 1986) 493 So.2d 1374, 1379.) Among the factors which may be considered by the trial court is "the 'financial position' of the defendant; . . . " (*Haslip*, p. 22, quoting from *Green Oil Co. v. Hornsby* (Ala. 1989) 539 So.2d 218, 223.)

However, while the post-verdict review procedures are available in Alabama, they are not mandatory. While " 'fundamental fairness' requires that the defendant be given the opportunity to present proof to the trial court during post-judgment review of the verdict that the punitive award is unreasonable, disproportionate, or economically destructive" (*Industrial Chemical v. Chandler* (Ala. 1988) 547 So.2d 812, 839), it is up to the defendant to move for such a review and to present such proof. Error must be affirmatively shown by the record. If the defendant fails to avail itself of the opportunity to offer proof

of its financial condition, the record will not establish that the amount of the award is disproportionate to the defendant's ability to pay, and the award must be upheld. (*Fuller v. Preferred Risk Life Ins. Co.* (Ala. 1991) 577 So.2d 878, 886.)

In short, in *Haslip* the Supreme Court held that a system of imposing punitive damages comports with due process even though no evidence of the defendant's financial condition is admissible at trial and no such evidence need be introduced post-judgment unless the defendant chooses to do so. That holding cannot be reconciled with Keat's contention that the introduction of such evidence is a constitutionally mandated prerequisite to a punitive damage award.

His secondary argument – that the Constitution does not permit the burden of proving a defendant's financial condition to be allocated to the defendant rather than the plaintiff – is also incorrect. In particular, his reliance on *Speiser v. Randall* (1958) 357 U.S. 513 [2 L.Ed.2d 1460] is misplaced. As that court noted, even in a criminal trial it is permissible to shift the burden of going forward with the evidence to the defendant at some stage, so long as the prosecution has first " 'proved enough to make it just for the defendant to be required to repel what has been proven with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.' " (*Id.*, p. 524, quoting *Morrison v. California* (1934) 291 U.S. 82, 88-89 [78 L.Ed. 664, 669]; *Patterson v. New York* (1977) 432 U.S. 197, 203, fn. 9 [97 S. Ct. 2319, 2323].) The burden of proving the existence of a

mitigating circumstance affecting the severity of punishment may be imposed upon the defendant. (*Patterson*, pp. 207-209.)

Similarly, here the burden shifts to the defendant to offer evidence relevant to the amount of punitive damages which can be borne by the defendant only after the plaintiff has first offered proof of the defendant's liability for punitive damages in some amount. Furthermore, since the defendant's financial condition is "information particularly within his power to produce" (*Woods-Drake v. Lundy, supra*, 667 F.2d at p. 1203, fn. 9), the presentation of that information by the defendant does not present a hardship. By contrast, under the procedure condemned in *Speiser*, the burdens of producing evidence and of persuasion throughout the proceedings fell entirely on the party to be penalized. (*Id.*, pp. 521-522.)

2. California's Rule that a Punitive Damage Award Must Be Supported by Evidence of the Defendant's Financial Condition Is Substantive Law.

Keat's second contention – that, even if not constitutionally required, the rule of *Adams v. Murakami* is a procedural rule which a California trial court is bound to apply when determining the plaintiffs' rights under federal substantive law – is also incorrect.

As with many other federal statutes, California courts and the federal courts exercise concurrent jurisdiction over actions brought pursuant to section 1983. (*Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 173, fn. 10.) The general rule is that where an action founded on a federal

statute is brought in a state court, the law of the state controls in matters of practice and procedure unless the federal statute provides otherwise. (*Bach v. County of Butte* (1983) 147 Cal.App.3d 554, 561-562 [§ 1983 action]; *King v. Schumacher* (1939) 32 Cal.App.2d 172, 181 [F.E.L.A. action].)

Nothing in section 1983 imposes federal procedural law upon state courts trying civil rights actions.[3] Accordingly, the initial question before us whether California's rule requiring evidence of financial condition is a rule of substance or of practice and procedure.[4]

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[3] Nor does 42 U.S.C. section 1988. It specifies that when enforcing the civil rights act, the federal courts shall proceed "in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law," a federal court shall apply the law of the state in which the court is located, "so far as the same is not inconsistent with the Constitution and laws of the United States. . . . " Thus, while section 1988 provides that federal courts should sometimes apply aspects of state law in section 1983 actions, it is silent on when state courts must follow federal procedural law.

[4] Even when a particular rule is judged to be procedural, the inquiry does not end there, because a "federal right cannot be defeated by the forms of local practice." (*Brown v. Western Railway of Alabama* (1949) 338 U.S. 294, 296 [94 L.Ed. 100, 102]; accord, *Williams v. Horvath* (1976) 16 Cal.3d 834, 841 [§ 1983 "may not be frustrated by state substantive limitations couched in procedural language."].) Accordingly, states may apply their own procedural rules to federal claims only if those rules are "neutral" and are not pre-empted by federal law. (*Howlett v. Rose* (1990) 496 U.S. 356, 372 [110 S.Ct. 2430, 2441].) That is, the

"Practice and procedure" refers to "the mode of proceeding by which a legal right is enforced, as distinguished from the substantive law which gives or declares the right. . . . " (*King v. Schumacher, supra,* p. 181; and see 3 Witkin, Cal. Procedure (3d ed. 1985) Actions, § 62, p. 91 ["Matters of 'substance' or 'substantive' matters deal with legal rights. Matters of 'procedure' deal with remedies."].) This distinction, though easy to state in the abstract, can be "shadowy and difficult to draw" in practice. (3 Witkin, Cal. Procedure, *supra,* § 62, p. 91.) Such is the case here.

On the one hand, the rule of *Adams v. Murakami, supra,* does not purport to change the types of conduct which are actionable under section 1983, nor the types of damages available to remedy that wrongful conduct. It does not prohibit awards of punitive damages or affect the type of conduct which will create liability for punitive damages. Instead, it pertains solely to the type of evidence necessary to establish the appropriate amount of punitive damages. That the rule concerns the manner of proving the amount of one type of remedy suggests that

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rules must not discriminate between state law claims and federal law claims (*id.,* pp. 372-380 [110 S.Ct. at pp. 2441-2445]) or (in the context of section 1983) between governmental defendants and nongovernmental defendants (*Felder v. Casey* (1988) 487 U.S. 131, 141-150 [108 S.Ct. 2302, 2308-2313]). Furthermore, they must not in any other manner " 'impose unnecessary burdens upon rights of recovery authorized by federal laws.' " (*Id.,* p. 150 [108 S.Ct. at p. 2313]).

Keat argues that the rule requiring evidence of financial condition is neutral. We agree; however, that neutrality is insignificant unless and until it is first determined that the rule is procedural.

it is procedural. Procedural rules are those which govern "the machinery for carrying on the suit, including pleading, process, evidence and practice, whether in the trial court or the appellate court. . . . " (*King v. Schumacher, supra,* 32 Cal.App.2d at p. 182.)

Similarly, it can be argued that the rule must be procedural because it does not pertain to substantive rights. Unlike compensatory damages, punitive damages "are never awarded as of right, no matter how egregious the defendant's conduct." (*Smith v. Wade* (1983) 461 U.S. 30, 52 [103 S.Ct. 1625, 1638].) Even when sufficiently serious misconduct has been established, the jury has the discretion not to award punitive damages. (*Ibid.*) Thus, no plaintiff has a "right" to that particular remedy.

On the other hand, the California Supreme Court has said that the rule requiring the introduction of evidence of financial condition is a rule of substantive law: "Evidence Code section 500 states, 'Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential *to the claim for relief* or defense that he is asserting.' (Italics added.) As the California Law Revision Commission explained, 'The facts that must be shown to establish a cause of action or a defense are determined by the substantive law, not the law of evidence.' [Citation.] In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. . . . Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for

relief.' (Evid. Code, § 500.)" (*Adams v. Murakami, supra*, p. 119.)

At least one court has relied on this language to state in dicta that the rule of *Adams*, being substantive law, does not apply in section 1983 cases. (*Barber v. Rancho Mortgage & Investment Corp.* (1994) 26 Cal.App.4th 1819, 1842, fn. 26.) Other cases state more generally that rules setting forth " 'the elements necessary for the prima facie section 1983 cause of action and damages' " are substantive. (*Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 878, quoting *Greene v. Zank* (1984) 158 Cal.App.3d 497, 503; and see *Howlett v. Rose, supra*, p. 375 [110 S.Ct. at p. 2442] ["The elements of, and the defenses to, a federal cause of action are defined by federal law."].)

Since our Supreme Court has determined the rule of *Adams* is one of substantive law, and since that characterization appears consistent with section 1983 cases, we come to the same conclusion here. Because a state court cannot apply its own substantive law when adjudicating federal claims, it follows that the trial court properly refused to apply the rule of *Adams* in this section 1983 case.

Adams being inapplicable, the trial court properly invoked the federal rule, which imposes upon the defendant the obligation to introduce any evidence of financial condition if that evidence is to be considered. (*Woods-Drake v. Lundy, supra*, 667 F.2d at p. 1203, fn. 9.) That Keat failed to introduce any such evidence does not render the punitive damage award improper. (*Ibid.*)

3. California's Standard of Review Does Not Deprive a Defendant of Due Process.

Keat argues (1) that three aspects of Alabama procedural law which protect against unbridled discretion by juries when assessing punitive damages are missing from California law, (2) that the United States Supreme Court in *Pacific Mut. Life Ins. Co. v. Haslip, supra,* considered those three procedural devices to be essential to ensure due process to a defendant seeking review of a punitive damages award, and (3) that therefore the procedure followed here violates due process and the award must be reversed as unconstitutional. We disagree.

The first of the three features of Alabama law cited by Keat is the ability of the trial court to hold a post-judgment hearing at which evidence may be introduced which was not before the jury. The availability of such an evidentiary hearing is important in Alabama because, as noted above, that state forbids the introduction at trial of evidence of such matters as the defendant's financial condition. (*Southern Life & Health Ins. Co. v. Whitman, supra,* 358 So.2d at pp. 1026-1027.)

In California, by contrast, evidence relevant to the amount of punitive damages is admissible. (Civ. Code, § 3295.) Therefore, in California it is of little significance whether or not such evidence may be introduced for the first time in a post-judgment hearing. The important thing, after all, is not when the evidence was introduced, but rather that the evidence is in the record so that it may be considered by the trial court in a motion for new trial and by an appellate court on review. Thus, we do not

view this alleged difference in procedure to be a defect of constitutional proportion.[5]

Second, Keat notes that Alabama law provides that, in reviewing a punitive damages award, an appellate court compares the amount of the award to those made in similar cases. (*Haslip*, p. 21 [113 L.Ed.2d at p. 21].) California law is to the contrary. (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 818-819; but cf. *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 390, 393-396 [conducting such a comparison].) However, after mentioning in a single sentence the existence of Alabama's comparative analysis rule, the United States Supreme Court did not cite that aspect of Alabama law again, and certainly did not identify it as an important aspect of appellate review.[6] Similarly, we do not believe that, given the fact-specific nature of any punitive damage award, such a comparison is essential for due process.

A third difference between California and Alabama law to which Keat refers is in the number and specificity of the factors to be considered by an appellate court in

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[5] Keat assumes, without citation to authority, that a party challenging the excessiveness of an award of punitive damages in a motion for a new trial or judgment notwithstanding the verdict is precluded under California law from introducing evidence relevant to the amount of punitive damages which was not introduced at trial. We do not decide that issue.

[6] Significantly, when the Alabama Supreme Court reviewed the punitive damage award against Pacific Mutual Life Insurance Company, it made no reference to any comparison to any other awards. (*Pacific Mut. Life Ins. Co. v. Haslip* (Ala. 1989) 553 So.2d 537, 543.)

evaluating a claim that a punitive damage award is excessive. Alabama law describes at least seven separate factors.[7] By contrast, the list of factors to be considered in California has been stated as consisting of only three.[8]

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[7] " '(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.

" '(2) The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or "cover-up" of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.

" '(3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.

" '(4) The financial position of the defendant would be relevant.

" '(5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.

" '(6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.

" '(7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award.' " (*Green Oil Co. v. Hornsby, supra,* 539 So.2d at pp. 223-224.)

[8] "One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. [Citations.] Another relevant yardstick

Keat complains that because the California list is "more limited in number and specificity" than that described by Alabama law, "California falls substantially short of Alabama in ensuring the fundamental fairness of its procedures for imposing and reviewing punitive damages awards."

We disagree, for two reasons. First of all, as Keat concedes, the United States Supreme Court opinion in *Haslip* is a fact-specific decision involving Alabama law and does not "formulate a general test by which to measure the constitutionality of other states' procedures. . . ." Thus, the mere fact that the objective standards provided by California law may be less numerous than those of Alabama does not mean that California procedure fails to comply with due process guaranties. The Supreme Court merely held that Alabama law was sufficient, not that it represented the constitutional minimum.

More fundamentally, Keat misses the point by focusing upon the "number and specificity" of the factors to be considered on review. Their significance is not in their quantity, but in their qualitative effect. The issue is whether the application of the standards "imposes a sufficiently definite and meaningful constraint on the discretion of . . . factfinders in awarding punitive damages."

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is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. [Citation.] Also to be considered is the wealth of the particular defendant. . . ." (*Neal v. Farmers Ins. Exchange, supra,* 21 Cal.3d at p. 928.)

Keat apparently construes this to be an exclusive list. We do not.

(*Háslip*, p. 22 [113 L.Ed.2d at p. 22].) Do the standards, in combination with jury instructions, evidentiary procedures, and any other relevant aspects of the state's procedure, "ensure[] that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages," and that the factfinder is "guided by more than the defendant's net worth"? (*Ibid.*) Considering Alabama law, the *Haslip* court answered these questions in the affirmative. California law passes the same tests. (Cf. *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1254-1259 [rejecting contention that California's review of punitive damage awards is inadequate].)

C. THE ATTORNEY'S FEE AWARD

After entry of judgment, the plaintiffs moved for an award of attorney's fees pursuant to 42 U.S.C. section 1988. The trial court granted the motion and set the amount of the fees at $89,950. Neither the minute order granting the motion nor the actual judgment makes any distinction between plaintiffs regarding the amount of attorney's fees to be recovered. To the contrary, the judgment indicates that the award is to all the plaintiffs collectively.

Keat argues that the award of attorney's fees must be reversed for redetermination in light of the reduction in the compensatory damage award, citing the rule "that if damages are substantially reduced on remand the court should reconsider the amount of the attorney's fees award." (*Smiddy v. Varney, supra*, 665 F.2d 261, 268.)

While the rule is sound, it has no application here, because we have found no reason to reduce the compensatory damage award.

DISPOSITION

The judgment is affirmed. Plaintiffs shall recover their costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION.

McKINSTER
J.

We concur:

DABNEY
Acting P.J.

RICHLI
J.

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

MARIA DE LA LUZ CHAVEZ, et al., Plaintiff and Respondent, v. WESLEY KEAT, Defendant and Appellant.	E011952 (Super.Ct.No. I-47976) **ORDER** (Filed Mar. 16, 1995)

The Court believes that further briefing from the parties may be helpful in resolving the issues raised in this appeal, as highlighted at oral argument. Accordingly, the order submitting this matter for decision is VACATED, and the parties are ORDERED to submit supplemental letter briefs addressing the following issues:

1. Are declarations from jurors concerning express agreements among the members of the jury as to how to calculate a particular damage award admissible to show that a special finding is inconsistent with a verdict, within the meaning of Code of Civil Procedure section 625?

2. Assuming that such evidence is admissible for that purpose, is the special finding that Keat did not "wrongfully cause the death" of Mr. Chavez {CT 66} inconsistent with:

a. The verdict in favor of Mrs. Chavez {CT 60}, given that the juror declarations {CT 342} indicate

that all or part of the compensatory damages awarded to her were calculated to compensate for losses resulting from the death of Mr. Chavez, i.e., lost income of $25,000 per year for 16 years?

b. The verdict in favor of the Estate {CT 62}, given that the juror declarations {CT 342-343} indicate that the compensatory damages awarded to it were calculated to compensate for losses resulting from the gunshot wound which resulted in the death of Mr. Chavez, i.e., his "medical treatment bills"?

3. Assuming the special finding is inconsistent with the verdicts, what is the remedy?

4. Assuming that the damage award to Mrs. Chavez must be reduced to the extent that it awarded damages to compensate her for losses resulting from the death of Mr. Chavez, what is the amount of that reduction? In particular, what significance is to be given to those portions of the juror declarations which state that the jurors agreed to award Mrs. Chavez damages calculated "by multiplying the 16 years of Mr. Chavez, Sr.'s life by $25,000 per year" and adding "an additional sum to compensate Mrs. Chavez for the humiliation resulting from being arrested and charged with murder" {CT 342-343, 345-346, 348-349, 351-352}, an agreement which is inconsistent with a total award to Mrs. Chavez of only $400,000?

5. Is there evidence in the record of losses or injuries suffered by Mrs. Chavez which were caused by Keat's illegal entry but not by the death of Mr. Chavez,

which could support an award of up to $400,000 in compensatory damages? If so, what is that evidence and how great an award would it support?

6. Assuming that the compensatory damage award to Mrs. Chavez must be substantially reduced, what is the effect on the award of punitive damages to Mrs. Chavez? In particular, does the judgment need to be reversed for a determination of what level of punitive damages would be appropriate in view of the new, substantially lesser award of compensatory damages? If so, is a retrial to be had on all issues, or solely on the matter of the amount of punitive damages?

Chavez's letter brief shall be served and filed not later than April 6, 1995. Keat's responsive letter brief shall be served and filed not later than April 20, 1995. No reply briefs shall be filed without leave of court.

McKINSTER
Acting P.J.

CC: see attached list

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NOTICE

Enclosed is the tentative opinion of a majority of the panel of three justices hearing the appeal. Limit and focus your oral argument accordingly. **Oral argument for each party will be limited to 15 minutes pursuant to California Rules of Court, rule 22.** The tentative opinion is, of course, subject to change in both language and result after oral argument.

CERTIFIED FOR PARTIAL PUBLICATION*

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

MARIA DE LA LUZ CHAVEZ, et al., Plaintiff and Respondent, v. WESLEY KEAT, Defendant and Appellant.	E011952 (Super.Ct.No. I-47976) **TENTATIVE OPINION**

APPEAL from the Superior Court of Riverside County. Eugene Bishop, Judge. Affirmed as modified.

Kinkle, Rodiger & Spriggs, Bruce Disenhouse, Greines, Martin, Stein & Richland, Timothy T. Coates and Carolyn Oill for Defendant and Appellant.

Burton C. Jacobson for Plaintiffs and Respondents.

Wesley Keat, a Riverside County Deputy Sheriff, appeals from a judgment entered against him on a claim pursuant to 42 U.S.C. section 1983 ("section 1983") for compensatory and punitive damages, and from a post-judgment order awarding attorney's fees. We correct the

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts A, B.3., and C.

compensatory award in favor of one of the plaintiffs and affirm as modified.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 6 p.m. on November 8, 1985, Keat was on patrol when he responded to a dispatch concerning a verbal argument between two males inside a particular residence in Thermal. {RT 528-534} On his arrival, he observed two males, Crescencio Chavez, Jr. ("Chavez") and an unrelated neighbor, in the front yard of the Chavez residence, which is next door to the residence mentioned in the dispatch. {RT 538-540} Keat recognized that the addresses were different; nevertheless, when the two males went into the Chavez residence, Keat followed them into the house without knocking or announcing his presence. {RT 538-541} Shortly thereafter a second officer also arrived.

A struggle ensued involving Keat, the other officer, Chavez, Chavez's mother, Maria de la Luz Chavez ("Mrs. Chavez"), his father, Crescencio Chavez, Sr. ("Mr. Chavez"), and his son, Steven Chavez. In what may have been a misguided effort [sic] get everyone's attention and stop the struggle, Mr. Chavez fired a gun. Keat and the other officer responded by firing at Mr. Chavez, killing him.

Chavez, Mrs. Chavez, Steven, and the administrator of the estate of Mr. Chavez ("Chavez Estate") sued Keat and others under state law for damages for wrongful death and other torts, and under section 1983 for the violation of their civil rights. {CT 1, et seq.} The jury rejected the state law tort claims {CT 52-59}, but found

Keat liable under federal law for violating the plaintiffs' civil rights. {CT 60-63} To Mrs. Chavez, the jury awarded $400,000 in compensatory damages and $100,000 in punitive damages; to the Chavez Estate, $6,200 in compensatory damages; and to Chavez and Steven, $1 each in compensatory damages. {*Ibid.*; CT 558}

CONTENTIONS

On appeal, Keat contends that the compensatory damage awards are not supported by substantial evidence, that the punitive damage award is excessive and is a violation of due process, and that the attorney's fee award entered after judgment must be redetermined.

DISCUSSION

A. THE COMPENSATORY DAMAGE AWARDS

In arguing that the compensatory damage awards to Mrs. Chavez and to the Chavez Estate lack evidentiary support, Keat reasons as follows: (1) The jury found that his entry into and search of the Chavez residence had been unreasonable. {CT 66} (2) However, the jury also found that Keat did not "wrongfully cause the death" of Mr. Chavez. {CT 66} (3) "[T]he jury's express finding that Mr. Chavez's death was not wrongful necessarily implies that the death was not proximately caused by the illegal entry." {AOB 13} (4) Since the death was not caused by Keat's only wrongful act, Keat is not liable for any damages resulting from that death. (5) Nevertheless, the jury calculated the compensatory damage awards on the basis

of losses resulting from Mr. Chavez's death.[1] {CT 341, et seq.} (6) Moreover, other than losses caused by the death, there is no evidence of actual losses accruing as the result of the illegal entry and search. (7) Therefore, once the death damages are excluded, the damage awards are not supported by substantial evidence.

Keat's argument fails, because his third premise is incorrect. Damages do not necessarily have only a single cause. To the contrary, a particular injury may have multiple causes, each of which is considered to be a proximate cause. For instance, a gunshot wound which was directly caused by one person (e.g., the person who fired the gun) may have also been proximately caused, albeit less directly, by another person (e.g., the person who negligently entrusted the first person with a weapon).

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[1] Uncontradicted declarations submitted in support of Keat's motion for new trial establish that the jurors expressly agreed among themselves that the compensatory damage award in favor of Mrs. Chavez would be calculated by multiplying $25,000 per year times Mr. Chavez's life expectancy of 16 years. "We arrived at the $25,000 per year figure by discussing and then verbally agreeing that said figure represented the yearly loss of income and support suffered by reason of Mr. Chavez's death." {CT 342} As to the Chavez Estate, the jury "agreed that the damages would consist of the funeral expenses and medical treatment bills incurred with respect to the decedent. . . . " {*Ibid.*}

Despite Evidence Code section 1150, evidence of a discussion and express agreement to calculate a damage award in a particular fashion is admissible to impeach a verdict, because the agreement is an overt act which is objectively verifiable and subject to corroboration. (*Krouse v. Graham* (1977) 19 Ca1.3d 59, 80-81.)

By the same token, the damages suffered by the plaintiffs may have had multiple causes. Here, the jury apparently concluded that the death of Mr. Chavez and the damages that resulted from it had at least two proximate causes: Keat's shooting of his weapon and Keat's entry into the house. That it concluded that the more direct cause was not wrongful, and thus did not carry liability for the resulting injuries, did not prevent it from concluding that the more remote cause was wrongful and did result in liability.[2]

The existence of proximate cause is a question of fact for the jury. (*Hoyem v. Manhattan Beach City Sch. Dist.* (1978) 22 Ca1.3d 508, 520.) Here, we cannot say that the jury's implied findings on that issue are unsupported by the evidence. Accordingly, there is nothing improper in concluding that Keat should compensate Mrs. Chavez and the Chavez Estate for losses they suffered as the result of Mr. Chavez's death.

The cases relied upon by Keat as authority for the opposite conclusion are not on point. In *George v. City of Long Beach* (9th Cir. 1992) 973 F.2d 706, the court held that a plaintiff who was shot after a warrantless entry into his apartment was entitled only to nominal damages. (*Id.*, p. 708.) There, however, the jury had found that the plaintiff's injuries were not caused by the illegal entry. (*Ibid.*) Here, the jury impliedly found the opposite. Just as the

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[2] The findings are not inconsistent. The jury may have concluded that, under the circumstances, the officers were justified in firing at and killing Mr. Chavez, but that Keat was at fault for creating those circumstances in the first place by entering the residence illegally.

George court refused to upset the jury's factual finding regarding causation (*Id.*, p. 709), we cannot do so here.

Similarly, *Smiddy v. Varney* (9th Cir. 1981) 665 F.2d 261 is factually distinguishable. It holds that the officers who negligently arrested the plaintiff could be liable for damages resulting from his arrest, but not those accruing after the filing of a criminal complaint by the district attorney. (*Id.*, pp. 266-267.) As the court explained, the "[f]iling of a criminal complaint immunizes investigating officers . . . from damages suffered thereafter because it is presumed that the prosecutor filing the complaint exercised independent judgment in determining that probable cause for an accused's arrest exists at that time." (*Id.*, p. 266.) That rule has no application here, where the decedent was shot before he could be arrested, much less charged.

While the compensatory damage award in favor of Mrs. Chavez is supported by the evidence, that in favor of the Chavez Estate is not. As noted (see fn. 1), the jury calculated the $6,200 award to the estate on the basis of Mr. Chavez's "funeral expenses and medical treatment bills. . . . " {CT 342} However, the damages recoverable in a survival action "are limited to the loss or damage the decedent sustained or incurred prior to death. . . . " (Former Prob. Code, § 573, subd. (c); see now Code Civ. Proc., § 377.34.) Thus, while evidence was admitted regarding the payment of funeral expenses, cemetery expenses, burial clothing, and flowers {RT 298}, none of those expenses are recoverable by the estate. The only evidence of damages that are recoverable by the estate concerns ambulance charges ($503.95 {RT 298}) and emergency room charges ($1,200 {RT 306}). Accordingly,

the compensatory damage award to the Chavez Estate must be reduced to $1,703.95.

B. THE PUNITIVE DAMAGE AWARD

The purpose of punitive damages is not to destroy the defendant (*Adams v. Murakami* (1991) 54 Ca1.3d 105, 112), but "to penalize wrongdoers in a way that will deter them and others from repeating the wrongful conduct in the future" (*Wyatt v. Union Mortgage Co.* (1979) 24 Ca1.3d 773, 790). "[T]he function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. [Citations.] By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal v. Farmers Ins. Exchange* (1978) 21 Ca1.3d 910, 928; *Adams*, p. 110.) Thus, "a punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Id.*, p. 112.)

On appeal, we review punitive damage awards to determine whether they are excessive. (*Adams*, pp. 109-110.) However, "[a] reviewing court cannot make a fully informed determination of whether an award of punitive damages is excessive unless the record contains evidence of the defendant's financial condition." (*Id.*, p. 110.) Therefore, *Adams* established the rule in California that if there is no such evidence in the record, the award of punitive damages is excessive as a matter of law and must be reversed. (*Id.*, pp. 114-115.) In addition, *Adams*

imposes the burden of producing that evidence on the plaintiff. (*Id.*, p. 119.)

However, the view adopted in California by *Adams* is not universally held. The federal courts "reject the defendants' contention that evidence of their financial status was a prerequisite to the imposition of punitive damages. Although the wealth of the defendant . . . may be relevant to the imposition of punitive damages, [citations], it can hardly be said that the defendants' financial status was an element of plaintiffs' cause of action to be proved before punitive damages could be awarded." (*Bennis v. Gable* (3d Cir. 1987) 823 F.2d 723, 734, fn. 14.) Instead, under federal law "it is defendant, and not plaintiff, who must carry the burden of introducing evidence of net worth if defendant wishes these facts to be considered in awarding punitive damages." (*Woods-Drake v. Lundy* (5th Cir. 1982) 667 F.2d 1198, 1203, fn. 9.) If, despite notice of the plaintiff's claim for punitive damages, a defendant makes no effort to satisfy that burden, "punitive damages shall be awarded despite incomplete knowledge of defendant's financial position." (*Ibid.*, accord, *Zarcone v. Perry* (2d Cir. 1978) 572 F.2d 52, 56, and cases therein cited; but see *Keenan v. City of Philadelphia* (3d Cir. 1992) 983 F.2d 459, 482, fn. 9 (conc. & dis. opn. of Higginbotham, J.) [listing cases supporting opposite rule].)

At trial, neither the plaintiffs nor Keat introduced any evidence of his financial condition. After the verdict, Keat moved for a new trial {CT 338} on the ground, inter alia, that the punitive damage award was excessive because of the absence of such evidence at trial. {CT 364} However, he did not support his motion with any evidence that the award was disproportionate to his ability

to pay. {CT 355-356} Nor did the plaintiffs oppose that motion with any evidence of Keat's assets. {CT 543-545}

Despite his failure to avail himself of the opportunity to offer evidence of his supposedly limited financial means, Keats argues that the punitive damage award must be reversed, for three reasons. First, he contends that an award of punitive damages against a defendant violates federal constitutional due process guaranties unless the plaintiff introduces evidence of the defendant's financial condition. Second, he argues that the rule of *Adams v. Murakami, supra,* is a rule of procedure which controls the prosecution of a federal cause of action in a California court. Third, he claims that the standard of review utilized by California courts when assessing the excessiveness of punitive damage awards lacks the objective standards necessary to ensure due process.

1. Evidence of Keat's Financial Condition Is Not Required By the Fourteenth Amendment.

Keat's first contention is incorrect. While he claims that the rules in *Adams v. Murakami, supra,* "rest on due process principles" {AOB 22}, the Supreme Court expressly based them instead on state common law. "The question before us is one of state law. . . . " (*Id.,* p. 116.) "We need not decide, and do not decide, whether evidence of a defendant's financial condition is a *constitutional* prerequisite . . . to an award of punitive damages." (*Id.,* 54 Ca1.3d at p. 118.)

Moreover, *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1 [113 L.Ed.2d 1] ("*Haslip*"), the controlling United

States Supreme Court authority on this issue, is contrary to Keat's contention. There, the Supreme Court upheld against a due process attack the Alabama procedures regarding punitive damage awards. Unlike California, Alabama *forbids* the introduction of evidence of the defendant's wealth at trial. (*Id.*, p. 19 [113 L.Ed.2d at p. 21]; *Southern Life & Health Ins. Co. v. Whitman* (Ala. 1978) 358 So.2d 1025, 1026-1027.) If such evidence were constitutionally required to support a punitive damage award, the Supreme Court could not have affirmed the judgment.

Instead, the Supreme Court relied upon the existence of post-verdict procedures for reviewing a jury's discretion in setting the amount of punitive damages. (*Haslip*, pp. 20-22 [113 L.Ed.2d at pp. 21-22].) Alabama law, it noted, provides that punitive damage verdicts may be challenged as excessive in a motion to the trial court. (*Id.*, p. 20, citing *Hammond v. Gadsden* (Ala. 1986) 493 So.2d 1374, 1379.) Among the factors which may be considered by the trial court is "the 'financial position' of the defendant; . . . " (*Haslip*, p. 22, quoting from *Green Oil Co. v. Hornsby* (Ala. 1989) 539 So.2d 218, 223.)

However, while the post-verdict review procedures are available in Alabama, they are not mandatory. While " 'fundamental fairness' requires that the defendant be given the opportunity to present proof to the trial court during post-judgment review of the verdict that the punitive award is unreasonable, disproportionate, or economically destructive" (*Industrial Chemical v. Chandler* (Ala. 1988) 547 So.2d 812, 839), it is up to the defendant to move for such a review and to present such proof. Error

must be affirmatively shown by the record. If the defendant fails to avail itself of the opportunity to offer proof of its financial condition, the record will not establish that the amount of the award is disproportionate to the defendant's ability to pay, and the award must be upheld. (*Fuller v. Preferred Risk Life Ins. Co.* (Ala. 1991) 577 So.2d 878, 886.)

In short, in *Haslip* the Supreme Court held that a system of imposing punitive damages comports with due process even though no evidence of the defendant's financial condition is admissible at trial and no such evidence need be introduced post-judgment unless the defendant chooses to do so. That holding cannot be reconciled with Keat's contention that the introduction of such evidence by the plaintiff is a constitutionally mandated prerequisite to a punitive damage award.

2. California's Rule that a Punitive Damage Award Must Be Supported by Evidence of the Defendant's Financial Condition Is Substantive Law.

Keat's second contention – that, even if not constitutionally required, the rule of *Adams v. Murakami* is a procedural rule which a California trial court is bound to apply when determining the plaintiffs' rights under federal substantive law – is also incorrect.

As with many other federal statutes, California courts and the federal courts exercise concurrent jurisdiction over actions brought pursuant to section 1983. (*Ochoa v. Superior Court* (1985) 39 Ca1.3d 159, 173, fn. 10.) The general rule is that where an action founded on a federal

statute is brought in a state court, the law of the state controls in matters of practice and procedure unless the federal statute provides otherwise. (*Bach v. County of Butte* (1983) 147 Cal.App.3d 554, 561-562 [§ 1983 action]; *King v. Schumacher* (1939) 32 Cal.App.2d 172, 181 [F.E.L.A. action].)

Nothing in section 1983 imposes federal procedural law upon state courts trying civil rights actions.[3] Accordingly, the initial question before us [sic] whether California's rule requiring evidence of financial condition is a rule of substance or of practice and procedure.[4]

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[3] Nor does 42 U.S.C. section 1988. It specifies that when enforcing the civil rights act, the federal courts shall proceed "in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law," a federal court shall apply the law of the state in which the court is located, "so far as the same is not inconsistent with the Constitution and laws of the United States. . . . " Thus, while section 1988 provides that federal courts should sometimes apply aspects of state law in section 1983 actions, it is silent on when state courts must follow federal procedural law.

[4] Even when a particular rule is judged to be procedural, the inquiry does not end there, because a "federal right cannot be defeated by the forms of local practice." (*Brown v. Western Railway of Alabama* (1949) 338 U.S. 294, 296 [94 L.Ed. 100, 102]; accord, *Williams v. Horvath* (1976) 16 Ca1.3d 834, 841 [§ 1983 "may not be frustrated by state substantive limitations couched in procedural language."].) Accordingly, states may apply their own procedural rules to federal claims only if those rules are "neutral" and are not pre-empted by federal law. (*Howlett v. Rose* (1990) 496 U.S. 356, 372 [110 S.Ct. 2430, 2441].) That is, the rules must not discriminate between state law claims and

"Practice and procedure" refers to "the mode of proceeding by which a legal right is enforced, as distinguished from the substantive law which gives or declares the right. . . . " (*King v. Schumacher, supra,* p. 181; and see 3 Witkin, Cal. Procedure (3d ed. 1985) Actions, § 62, p. 91 ["Matters of 'substance' or 'substantive' matters deal with legal rights. Matters of 'procedure' deal with remedies."].) This distinction, though easy to state in the abstract, can be "shadowy and difficult to draw" in practice. (3 Witkin, Cal. Procedure, *supra,* § 62, p. 91.) Such is the case here.

On the one hand, the rule of *Adams v. Murakami, supra,* does not purport to change the types of conduct which are actionable under section 1983, nor the types of damages available to remedy that wrongful conduct. It does not prohibit awards of punitive damages or affect the type of conduct which will create liability for punitive damages. Instead, it pertains solely to the type of evidence necessary to establish the appropriate amount of punitive damages. That the rule concerns the manner of proving the amount of one type of remedy suggests that it is procedural. Procedural rules are those which govern

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federal law claims (*Id.,* pp. 372-380 [110 S.Ct. at pp. 2441-2445]) or (in the context of section 1983) between governmental defendants and nongovernmental defendants (*Felder v. Casey* (1988) 487 U.S. 131, 141-150 [108 S.Ct. 2302, 2308-2313]). Furthermore, they must not in any other manner " 'impose unnecessary burdens upon rights of recovery authorized by federal laws.' " (*Id.,* p. 150 [108 S.Ct. at p. 2313]).

Keat argues that the rule requiring evidence of financial condition is neutral. {AOB 23-24} We agree; however, that neutrality is insignificant unless and until it is first determined that the rule is procedural.

"the machinery for carrying on the suit, including pleading, process, evidence and practice, whether in the trial court or the appellate court. . . . " (*King v. Schumacher, supra,* 32 Cal.App.2d at p. 182.)

Similarly, it can be argued that the rule must be procedural because it does not pertain to substantive rights. Unlike compensatory damages, punitive damages "are never awarded as of right, no matter how egregious the defendant's conduct." (*Smith v. Wade* (1983) 461 U.S. 30, 52 [103 S.Ct. 1625, 1638].) Even when sufficiently serious misconduct has been established, the jury has the discretion not to award punitive damages. (*Ibid.*) Thus, no plaintiff has a "right" to that particular remedy.

On the other hand, the California Supreme Court has said that the rule requiring the introduction of evidence of financial condition is a rule of substantive law: "Evidence Code section 500 states, 'Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential *to the claim for relief* or defense that he is asserting.' (Italics added.) As the California Law Revision Commission explained, 'The facts that must be shown to establish a cause of action or a defense are determined by the substantive law, not the law of evidence.' [Citation.] In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. . . . Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' (Evid. Code, § 500.)" (*Adams v. Murakami, supra,* p. 119.)

At least one court has relied on this language to state in dicta that the rule of *Adams* is substantive law which does not apply in section 1983 cases. (*Barber v. Rancho Mortgage & Investment Corp.* (1994) 26 Cal.App.4th 1819, 1842, fn. 26.) Other cases state more generally that rules setting forth " 'the elements necessary for the prima facie section 1983 cause of action and damages' " are substantive. (*Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 878, quoting *Greene v. Zank* (1984) 158 Cal.App.3d 497, 503; and see *Howlett v. Rose, supra,* p. 375 [110 S.Ct. at p. 2442 ["The elements of, and the defenses to, a federal cause of action are defined by federal law."].)

Since our Supreme Court has determined the rule of *Adams* is one of substantive law, and since that characterization appears consistent with section 1983 cases, we come to the same conclusion here. Because a state court can apply only its own procedural law when adjudicating federal claims, it follows that the trial court properly refused to apply the substantive rule of *Adams* in this section 1983 case.

Adams being inapplicable, the trial court properly invoked the federal rule, which imposes upon the defendant the obligation to introduce any evidence of financial condition if that evidence is to be considered. (*Woods-Drake v. Lunday, supra,* 667 F.2d at p. 1203, fn. 9.) That Keat failed to introduce any such evidence does not render the punitive damage award improper. (*Ibid.*)

3. California's Standard of Review Does Not Deprive a Defendant of Due Process.

Keat argues (1) that three aspects of Alabama procedural law which protect against unbridled discretion by juries when assessing punitive damages are missing from California law, (2) that the United States Supreme Court in *Pacific Mut. Life Ins. Co. v. Haslip, supra,* considered those three procedural devices to be essential to ensure due process to a defendant seeking review of a punitive damages award, and (3) that therefore the procedure followed here violates due process and the award must be reversed as unconstitutional. We disagree.

The first of the three features of Alabama law cited by Keat is the ability of the trial court to hold a post-judgment hearing at which evidence may be introduced which was not before the jury. {AOB 31} The availability of such an evidentiary hearing is important in Alabama because, as noted above, that state forbids the introduction at trial of evidence of such matters as the defendant's financial condition. (*Southern Life & Health Ins. Co. v. Whitman, supra,* 358 So.2d at pp. 1026-1027.)

In California, by contrast, evidence relevant to the amount of punitive damages is admissible. (Civ. Code, § 3295.) Therefore, in California it is of little significance whether or not such evidence may be introduced for the first time in a post-judgment hearing. The important thing, after all, is not when the evidence was introduced, but rather that the evidence is in the record so that it may be considered by the trial court in a motion for new trial and by an appellate court on review. Thus, we do not

view this alleged difference in procedure to be a defect of constitutional proportion.[5]

Second, Keat notes that Alabama law provides that, in reviewing a punitive damages award, an appellate court compares the amount of the award to those made in similar cases. (*Haslip*, p. 21 [113 L.Ed.2d at p. 21].) {AOB 32} California law is to the contrary. (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 818-819; but cf. *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 390, 393-396 [conducting such a comparison].) However, after mentioning in a single sentence the existence of Alabama's comparative analysis rule, the United States Supreme Court did not cite that aspect of Alabama law again, and certainly did not identify it as an important aspect of appellate review.[6] Similarly, we do not believe that, given the fact-specific nature of any punitive damage award, such a comparison is essential for due process.

A third difference between California and Alabama law to which Keat refers is in the number and specificity of the factors to be considered by an appellate court in

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[5] Keat assumes, without citation to authority, that a party challenging the excessiveness of an award of punitive damages in a motion for a new trial or judgment notwithstanding the verdict is precluded under California law from introducing evidence relevant to the amount of punitive damages which was not introduced at trial. We do not decide that issue.

[6] Significantly, when the Alabama Supreme Court reviewed the punitive damage award against Pacific Mutual Life Insurance Company, it made no reference to any comparison to any other awards. (*Pacific Mut. Life Ins. Co. v. Haslip* (Ala. 1989) 553 So.2d 537, 543.)

evaluating a claim that a punitive damage award is excessive. Alabama law describes at least seven separate factors.[7] By contrast, the list of factors to be considered in California has been stated as consisting of only three.[8]

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[7] " '(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.

" '(2) The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or "cover-up" of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.

" '(3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.

" '(4) The financial position of the defendant would be relevant.

" '(5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.

" '(6) If criminal sanctions have been imposed on the defendant for his conduct, this sould [sic] be taken into account in mitigation of the punitive damages award.

" '(7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award.' " (*Green Oil Co. v. Hornsby, supra,* 539 So.2d at pp. 223-224.)

[8] "One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. [Citations.] Another relevant yardstick

Keat complains that because the California list is "more limited in number and specificity" than that described by Alabama law {AOB 34}, "California falls substantially short of Alabama in ensuring the fundamental fairness of its procedures for imposing and reviewing punitive damages awards." {AOB 33}

We disagree, for two reasons. First of all, as Keat concedes, the United States Supreme Court opinion in *Haslip* is a fact-specific decision involving Alabama law and does not "formulate a general test by which to measure the constitutionality of other states, procedures. . . ." {AOB 30} Thus, the mere fact that the objective standards provided by California law may be less numerous than those of Alabama does not mean that California procedure fails to comply with due process guaranties. The Supreme Court merely held that Alabama law was sufficient, not that it represented the constitutional minimum.

More fundamentally, Keat misses the point by focusing upon the "number and specificity" of the factors to be considered on review. Their significance is not in their quantity, but in their qualitative effect. The issue is whether the application of the standards "imposes a sufficiently definite and meaningful constraint on the discretion of . . . factfinders in awarding punitive damages."

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is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small [Citation.] Also to be considered is the wealth of the particular defendant. . . ." (*Neal v. Farmers Ins. Exchange, supra,* 21 Cal.3d at p. 928.)

Keat apparently construes this to be an exclusive list. We do not.

(*Haslip*, p. 22 [113 L.Ed.2d at p. 22].) Do the standards, in combination with jury instructions, evidentiary procedures, and any other relevant aspects of the state's procedure, "ensure[] that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages," and that the factfinder is "guided by more than the defendant's net worth"? (*Ibid.*) Considering Alabama law, the *Haslip* court answered these questions in the affirmative. California law passes the same tests. (Cf. *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1254-1259 [rejecting contention that California's review of punitive damage awards is inadequate].)

C. THE ATTORNEY'S FEE AWARD

After entry of judgment, the plaintiffs moved for an award of attorney's fees pursuant to 42 U.S.C. section 1988. {CT 299, et seq.} The trial court granted the motion and set the amount of the fees at $89,950. {CT 560} Neither the minute order granting the motion nor the actual judgment makes any distinction between plaintiffs regarding the amount of attorney's fees to be recovered. {CT 558, 560} To the contrary, the judgment indicates that the award is to all the plaintiffs collectively.

Keat argues that the award of attorney's fees must be reversed for redetermination in light of the reduction in the compensatory damage award, citing the rule "that if damages are substantially reduced on remand the court should reconsider the amount of the attorney's fees award."(*Smiddy v. Varney, supra*, 665 F.2d 261, 268.)

While the rule is sound, it has no application here, because the reduction in the amount of the compensatory damage award is not substantial when measured against the plaintiffs' recovery as a whole. The plaintiffs recovered $506,202. {CT 558} As explained above, because of the erroneous inclusion of damages accruing after Mr. Chavez's death, the damage award in favor of the Chavez Estate must be reduced by $4,496.05 to $1,703.95. However, that modification still leaves a total recovery by plaintiffs of $501,705.95. A reduction of less than one percent is not substantial, and is not likely to cause the trial court to believe that a reduction of attorney's fees would be appropriate.

DISPOSITION

The compensatory damage award in favor of the administrator of the estate of Mr. Chavez is reduced to $1,703.95. As modified, the judgment is affirmed. Plaintiffs shall recover their costs on appeal. CERTIFIED FOR PARTIAL PUBLICATION.

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

MARIA DE LA LUZ CHAVEZ, et al, Plaintiffs and Respondents, v. WESLEY KEAT, Defendant and Appellant.	E011952 (Super. Ct. No. I47976) County of Riverside (Filed Jun. 8, 1995)

THE COURT:

Appellant's petition for rehearing is DENIED.

McKINSTER
Presiding Justice

cc: See attached list.

MAILING LIST FOR CASE: E011952

Superior Court Clerk
Riverside County
P. O. Box 431 – Appeals
Riverside, CA 92502

Kinkle, Rodiger & Spriggs
Disenhouse, Bruce E.
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Riverside, CA 92501

Jacobson, Burton C.
424 S. Beverly Drive
Beverly Hills, CA 90212

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9601 Wilshire Blvd. Ste 544
Beverly Hills, CA 90210 5215

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

MARIA DE LA LUZ CHAVEZ, et al., Plaintiff and Respondent, v. WESLEY KEAT, Defendant and Appellant.	E011952 (Super.Ct.No. I-47976) **ORDER** (Filed Sep. 21, 1995)

The appellant's application for a stay of the issuance of the remittitur pending the filing and disposition of a petition to the United States Supreme Court for a writ of certiorari is DENIED. The clerk of this court shall issue the remittitur forthwith. This denial is without prejudice to a motion in the trial court for a stay of execution of the judgment, pursuant to Code of Civil Procedure section 918.

/s/ McKinster
Acting P.J.

CC: See attached list.

MAILING LIST FOR CASE: E011952

Superior Court Clerk
Riverside County
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Riverside, CA 92502

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COURT OF APPEAL
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

** REMITTITUR **

MARIA DE LA LUZ CHAVEZ, et al, Plaintiffs and Respondents, v. WESLEY KEAT, Defendant and Appellant.	E011952 (Super. Ct. No. I47976) County of Riverside

I, STEPHEN M. KELLY, Clerk of the Court of Appeal, State of California, Fourth Appellate District, certify the attached is a true and correct copy of the original opinion or decision entered in the above entitled cause on May 15, 1995 and this opinion or decision has now become final.

Respondent to recover costs on appeal.

[SEAL] Witness my hand and seal of the Court this September 21, 1995.

Stephen M. Kelly, Clerk

By: /s/ Illegible
Deputy clerk

cc: All parties (Copy of remittitur only, Rule 25(e), California Rules of Court).

MAILING LIST FOR CASE: [illegible]11952

Superior Court Clerk
Riverside County
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE

MARIA DE LA LUZ CHAVEZ, et al., Plaintiffs, vs. COUNTY OF RIVERSIDE, et al., Defendants.	CASE NO. INDIO 47976 SPECIAL VERDICT (#1) (Filed July 30, 1992)

(a) With respect to the wrongful death claim under state law, we, the jury in the above-entitled matter, find in favor of the plaintiffs (MARIA DE LA LUZ CHAVEZ and the nine children of CRESCENCIO CHAVEZ, SR.) and against

NO Defendant, WESLEY KEAT, and/or

NO Defendant, JOHN AMMAR

and assess general damages as follows: $ 0 .

(b) We find against plaintiffs and in favor of defendant(s):

YES Defendant, WESLEY KEAT, and/or

YES. Defendant, JOHN AMMAR.

DATED: July 30, 1992

/s/ Illegible
JURY FOREPERSON

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE

MARIA DE LA LUZ CHAVEZ, et al., Plaintiffs, vs. COUNTY OF RIVERSIDE, et al., Defendants.	CASE NO. INDIO 47976 SPECIAL VERDICT (#2A) (Filed Jul. 30, 1992)

(a) With respect to the claims under state law for battery (excessive force), intentional infliction of emotional distress, and false arrest and imprisonment, we, the jury in the above-entitled matter, find in favor of the plaintiff, MARIA DE LA LUZ CHAVEZ, and against

NO Defendant, WESLEY KEAT, and/or

NO Defendant, JOHN AMMAR

and assess general damages as follows: $ -0- .

(b) In addition to the general damages awarded above, we further assess punitive damages as follows:

NO Defendant, WESLEY KEAT $ -0- ;

NO Defendant, JOHN AMMAR $ -0- ;

– None.

(c) We find against plaintiff, MARIA DE LA LUZ CHAVEZ, and in favor of defendant(s):

YES Defendant, WESLEY KEAT, and/or

YES Defendant, JOHN AMMAR.

DATED: July 30 1992

/s/ illegible
JURY FOREPERSON

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE

MARIA DE LA LUZ CHAVEZ, et al., Plaintiffs, vs. COUNTY OF RIVERSIDE, et al., Defendants.	CASE NO. INDIO 47976 SPECIAL VERDICT (#2B) (Filed Jul. 30, 1992)

(a) With respect to the claims under state law for battery (excessive force), intentional infliction of emotional distress, and false arrest and imprisonment, we, the jury in the above-entitled matter, find in favor of the plaintiff, CRESCENCIO CHAVEZ, JR., and against

NO Defendant, WESLEY KEAT, and/or

NO Defendant, JOHN AMMAR

and assess general damages as follows: $ -0- .

(b) In addition to the general damages awarded above, we further assess punitive damages as follows:

NONE Defendant, WESLEY KEAT $ -0- ;

NONE Defendant, JOHN AMMAR $ -0- ;

0 None.

(c) We find against plaintiff, CRESCENCIO CHAVEZ, JR., and in favor of defendant(s):

YES Defendant, WESLEY KEAT, and/or

YES Defendant, JOHN AMMAR.

DATED: July 30 1992

/s/ illegible
JURY FOREPERSON

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE

MARIA DE LA LUZ CHAVEZ, et al., Plaintiffs, vs. COUNTY OF RIVERSIDE, et al., Defendants.	CASE NO. INDIO 47976 SPECIAL VERDICT (#2C) (Filed Jul. 30, 1992)

(a) With respect to the claims under state law for battery (excessive force), and intentional infliction of emotional distress, we, the jury in the above-entitled matter, find in favor of the plaintiff, STEVEN CHAVEZ, and against

NO Defendant, WESLEY KEAT, and/or

NO Defendant, JOHN AMMAR

and assess general damages as follows: $ -0- .

(b) In addition to the general damages awarded above, we further assess punitive damages as follows:

NONE Defendant, WESLEY KEAT $ 0 ;

NONE Defendant, JOHN AMMAR $ 0 ;

0 None.

(c) We find against plaintiff, STEVEN CHAVEZ, and in favor of defendant(s):

YES Defendant, WESLEY KEAT, and/or

YES Defendant, JOHN AMMAR.

DATED: July 30 1992

/s/ illegible
JURY FOREPERSON

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE

MARIA DE LA LUZ CHAVEZ, et al., Plaintiffs, vs. COUNTY OF RIVERSIDE, et al., Defendants.	CASE NO. INDIO 47976 SPECIAL VERDICT (#3) (Filed Jul. 30, 1992)

(a) With respect to the wrongful death claim under federal law, we, the jury in the above-entitled matter, find in favor of the plaintiffs (MARIA DE LA LUZ CHAVEZ, the nine children of CRESCENCIO CHAVEZ, SR., and ESTATE OF CRESCENCIO CHAVEZ, SR.) and against

NO Defendant, WESLEY KEAT, and/or

NO Defendant, JOHN AMMAR

and assess general damages as follows: $ -0- .

(b) In addition to the general damages awarded above, we further assess punitive damages as follows:

NO Defendant, WESLEY KEAT $ -0- ;

NO Defendant, JOHN AMMAR $ -0- ;

– None.

(c) We find against plaintiffs and in favor of defendant(s):

YES Defendant, WESLEY KEAT, and/or

YES Defendant, JOHN AMMAR.

DATED: July 30 1992

/s/ illegible
JURY FOREPERSON

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE

MARIA DE LA LUZ CHAVEZ, et al., Plaintiffs, vs. COUNTY OF RIVERSIDE, et al., Defendants.	CASE NO. INDIO 47976 SPECIAL VERDICT (#4A) (Filed Jul. 30, 1992)

(a) With respect to the claims under federal law for excessive force, illegal seizure, and illegal search, we, the jury in the above-entitled matter, find in favor of the plaintiff, MARIA DE LA LUZ CHAVEZ, and against

YES Defendant, WESLEY KEAT, and/or

NO Defendant, JOHN AMMAR

and assess general damages as follows: $ 400,000 .

(b) In addition to the general damages awarded above, we further assess punitive damages as follows:

YES Defendant, WESLEY KEAT $ 100,000 ;

NO Defendant, JOHN AMMAR $ -0- ;

0 None.

(c) We find against plaintiff, MARIA DE LA LUZ CHAVEZ, and in favor of defendant(s):

NO Defendant, WESLEY KEAT, and/or

YES Defendant, JOHN AMMAR.

DATED: July 30 1992

/s/ illegible
JURY FOREPERSON

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE

MARIA DE LA LUZ CHAVEZ, et al., Plaintiffs, vs. COUNTY OF RIVERSIDE, et al., Defendants.	CASE NO. INDIO 47976 SPECIAL VERDICT (#4B) (Filed Jul. 30, 1992)

(a) With respect to the claims under federal law for excessive force, illegal seizure, and illegal search, we, the jury in the above-entitled matter, find in favor of the plaintiff, CRESCENCIO CHAVEZ, JR., and against

YES Defendant, WESLEY KEAT, and/or

NO Defendant, JOHN AMMAR

and assess general damages as follows: $ 1.00 .

(b) In addition to the general damages awarded above, we further assess punitive damages as follows:

___ Defendant, WESLEY KEAT $ -0- ;

___ Defendant, JOHN AMMAR $ -0- ;

___ None.

(c) We find against plaintiff, CRESCENCIO CHAVEZ, JR., and in favor of defendant(s):

NO Defendant, WESLEY KEAT, and/or

YES Defendant, JOHN AMMAR.

DATED: Jul 30 1992

/s/ illegible
JURY FOREPERSON

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE

MARIA DE LA LUZ CHAVEZ, et al., Plaintiffs, vs. COUNTY OF RIVERSIDE, et al., Defendants.	CASE NO. INDIO 47976 SPECIAL VERDICT (#4C) (Filed Jul. 30, 1992)

(a) With respect to the claims under federal law for excessive force, illegal seizure, and illegal search, we, the jury in the above-entitled matter, find in favor of the plaintiff, ESTATE OF CRESCENCIO CHAVEZ, SR., and against

YES Defendant, WESLEY KEAT, and/or

NO Defendant, JOHN AMMAR

and assess general damages as follows: $ 6,200 .

(b) In addition to the general damages awarded above, we further assess punitive damages as follows:

___ Defendant, WESLEY KEAT $ 0 ;

___ Defendant, JOHN AMMAR $ 0 ;

___ None.

(c) We find against plaintiff, ESTATE OF CRESCENCIO CHAVEZ, SR., and in favor of defendant(s):

NO Defendant, WESLEY KEAT, and/or

YES Defendant, JOHN AMMAR.

DATED: July 30 1992

/s/ illegible
JURY FOREPERSON

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF RIVERSIDE

MARIA DE LA LUZ CHAVEZ, et al., Plaintiffs, vs. COUNTY OF RIVERSIDE, et al., Defendants.	CASE NO. INDIO 47976 SPECIAL VERDICT (#4D) (Filed Jul. 30, 1992)

(a) With respect to the claims under federal law for excessive force, and illegal search, we, the jury in the above-entitled matter, find in favor of the plaintiff, STEVEN CHAVEZ, and against

YES Defendant, WESLEY KEAT, and/or

NO Defendant, JOHN AMMAR

and assess general damages as follows: $ -$1.00- .

(b) In addition to the general damages awarded above, we further assess punitive damages as follows:

NO Defendant, WESLEY KEAT $ -0- ;

NO Defendant, JOHN AMMAR $ -0- ;

0 None.

(c) We find against plaintiff, STEVEN CHAVEZ, and in favor of defendant(s):

NO Defendant, WESLEY KEAT, and/or

YES Defendant, JOHN AMMAR.

DATED: July 30 1992

/s/ illegible
JURY FOREPERSON

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF RIVERSIDE

MARIA DE LA LUZ CHAVEZ, Plaintiff, v. COUNTY OF RIVERSIDE, et al., Defendants.	CASE NO: INDIO 47976 SPECIAL FINDINGS (Filed Jul. 30, 1992)

We, the jury in the above entitled action, make the following special findings:

1. Did defendant KEAT commit a battery (i.e. excessive force) on CRESCENCIO CHAVEZ, JR.?

ANSWER: Yes or No NO

1a. Did defendant AMMAR commit a battery (i.e. excessive force) on CRESCENCIO CHAVEZ, JR.?

ANSWER: Yes or No NO

2. Did defendant KEAT commit a battery (i.e. excessive force) on MARIA DELALUZ CHAVEZ?

ANSWER: Yes or No NO

2a. Did defendant AMMAR commit a battery (i.e. excessive force) on MARIA DELALUZ CHAVEZ?

ANSWER: Yes or No NO

3. Did defendant KEAT commit a battery (i.e. excessive force) on STEVEN CHAVEZ?

ANSWER: Yes or No NO

3a. Did defendant AMMAR commit a battery (i.e. excessive force) on STEVEN CHAVEZ?

ANSWER: Yes or No NO

4. Did defendant KEAT intentionally inflict emotional distress on CRESCENCIO CHAVEZ, JR.?

ANSWER: Yes or No NO

4a. Did defendant AMMAR intentionally inflict emotional distress on CRESCENCIO CHAVEZ, JR.?

ANSWER: Yes or No NO

5. Did defendant KEAT intentionally inflict emotional distress on MARIA DELALUZ CHAVEZ?

ANSWER: Yes or No NO

5a. Did defendant AMMAR intentionally inflict emotional distress on MARIA DELALUZ CHAVEZ?

ANSWER: Yes or No NO

6. Did defendant KEAT intentionally inflict emotional distress on STEVEN CHAVEZ?

ANSWER: Yes or No NO

6a. Did defendant AMMAR intentionally inflict emotional distress on STEVEN CHAVEZ?

ANSWER: Yes or No NO

7. Did the defendants falsely imprison/arrest CRESCENCIO CHAVEZ, JR.?

ANSWER: Yes or No NO

8. Did the defendants falsely imprison/arrest MARIA DELALUZ CHAVEZ?

ANSWER: Yes or No NO

9. Did the defendants wrongfully cause the death of CRESCENCIO CHAVEZ, SR.?

ANSWER: Yes or No NO

10. Did one or both of the defendants violate the Civil Rights of CRESCENCIO CHAVEZ, JR. by using excessive force on him?

ANSWER: Yes or No NO

11. Did one or both of the defendants violate the Civil Rights of MARIA DELALUZ CHAVEZ by using excessive force on her?

ANSWER: Yes or No NO

12. Did one or both of the defendants violate the Civil Rights of STEVEN CHAVEZ by using excessive force on him?

ANSWER: Yes or No NO

13. Did the defendants violate the Civil Rights of CRESCENCIO CHAVEZ, SR. by using excessive force on him?

ANSWER: Yes or No NO

14. Did one or both of the defendants unreasonably enter and search the home of CRESCENCIO CHAVEZ,

SR., CRESCENCIO CHAVEZ, JR., MARIA DELALUZ CHAVEZ and STEVEN CHAVEZ?

ANSWER: Yes or No YES

15. Is defendant KEAT entitled to Qualified Immunity for the alleged Federal Civil Rights Violations?

ANSWER: Yes or No NO

15a. Is defendant AMMAR entitled to Qualified Immunity for the alleged Federal Civil Rights Violations?

ANSWER: Yes or No YES

16. Did the conduct of defendant KEAT:

a) Constitute despicable conduct?

b) Constitute malicious or oppressive conduct?

ANSWER: Yes or No 16(a) NO
16(b) NO

17. Did the conduct of defendant AMMAR:

a) Constitute despicable conduct?

b) Constitute malicious or oppressive conduct?

ANSWER: Yes or No 17(a) NO
17(b) NO

18. If the answers to any parts of findings 16 and 17 are "Yes," please indicate which plaintiff or plaintiffs were the subject of that conduct.

ANSWER: Yes or No ___

MARIA DELALUZ CHAVEZ ___

CRESCENCIO CHAVEZ, JR. ___

CRESCENCIO CHAVEZ, SR. ___

STEVEN CHAVEZ ___

Date: July 30 1992

/s/ illegible
FOREPERSON

(SPACE BELOW FOR FILING STAMP ONLY)

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Attorneys for Defendants,
COUNTY OF RIVERSIDE and
DEPUTY SHERIFF JOHN AMMAR

Entered nunc pro tunc as of 9/17/92

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF RIVERSIDE

MARIA DE LA LUZ CHAVEZ, et al., Plaintiffs, vs. COUNTY OF RIVERSIDE, et al., Defendants.	CASE NO. INDIO 47976 **FIRST AMENDED JUDGMENT** (Filed Oct. 9, 1992)

WHEREAS, the above-entitled matter come on for jury trial on July 13, 1992 before the Honorable Eugene R. Bishop, judge presiding in Department A; and

WHEREAS, at the end of the plaintiffs' case in chief, the court granted the Motion for a Directed Verdict by the defendant, COUNTY OF RIVERSIDE, as to the claims based on the Federal Civil Rights Law; and

WHEREAS, at the conclusion of all of the testimony and evidence, the court submitted the matter to the jury and further submitted Special Verdicts 1, 2A, 2B, 2C, 3, 4A, 4B, 4C and 4D, to the jury; and

WHEREAS, the jury in the above-entitled action returned its verdicts on July 30, 1992; and

WHEREAS, the jury found in favor of all defendants and against all plaintiffs on Special Verdicts 1, 2A, 2B, 2C, and 3, which verdicts related to the claims made under the State Law of the State of California; and

WHEREAS, the jury found in favor of defendant, JOHN AMMAR, and against all plaintiffs, on Special Verdicts 4A, 4B, 4C and 4D, which verdicts related to the claims made under Federal Law; and

WHEREAS, the jury returned its Special Verdict 4A in favor of plaintiff, MARIA DE LA LUZ CHAVEZ, with respect to the claims under Federal Law and against defendant, WESLEY KEAT, only, and assessed general damages in the sum of $400,000.00 and punitive damages in the sum of $100,000.00; and

WHEREAS, the jury returned its Special Verdict 4B in favor of plaintiff, CRESCENCIO CHAVEZ, JR., with respect to claims made under Federal Law and against defendant, WESLEY KEAT, only, and assessed general damages in the sum of $1.00; and

WHEREAS, the jury returned its Special Verdict 4C and found in favor of plaintiff, ESTATE OF CRESCENCIO CHAVEZ, SR., with respect to claims made under Federal Law and against defendant, WESLEY KEAT, only, and assessed general damages in the sum of $6,200.00; and

WHEREAS, the jury returned its Special Verdict 4D in favor of plaintiff, STEVEN CHAVEZ, with respect to claims made under Federal Law and against defendant, WESLEY KEAT, only, and assessed general damages in the sum of $1.00; and

WHEREAS, it was stipulated by and between defendant, COUNTY OF RIVERSIDE, and plaintiffs that said defendant would pay for any and all damages awarded plaintiff(s) and against either defendant, WESLEY KEAT and/or JOHN AMMAR, except for any punitive damages award.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Judgment is entered in favor of defendant, JOHN AMMAR, and against all plaintiffs;

2. Judgment is entered in favor of defendant, COUNTY OF RIVERSIDE, and against all plaintiffs;

3. Judgment is entered in favor of defendant, WESLEY KEAT, and against plaintiffs, MARIA LOUISE HUERTA, ERNESTO G. CHAVEZ, PAULA CHAPPA, ROSE DEL TORO, ARTURO G. CHAVEZ, JUAN FRANCISCO CHAVEZ, DORA LUZ TORRES, and BERTHA PALOMO;

4. Judgment is entered in favor of plaintiff, MARIA DE LA LUZ CHAVEZ, and against defendant, WESLEY KEAT, for general damages in the amount of $400,000.00 and punitive damages in the sum of $100,000.00;

5. Judgment is entered in favor of plaintiff, CRESCENCIO CHAVEZ, JR., and against defendant, WESLEY KEAT, in the sum of $1.00;

6. Judgment is entered in favor of plaintiff, ESTATE OF CRESCENCIO CHAVEZ, SR., and against defendant, WESLEY KEAT, in the sum of $6,200.00; and

7. Judgment is entered in favor of plaintiff, STEVEN CHAVEZ, and against defendant, WESLEY KEAT, in the sum of 1.00.

FURTHER, plaintiffs, MARIA DE LA LUZ CHAVEZ, CRESCENCIO CHAVEZ, JR., STEVEN CHAVEZ and THE ESTATE OF CRESCENCIO CHAVEZ, SR., are awarded their costs against defendant, WESLEY KEAT, in the sum of $975.00;

Plaintiffs, MARIA DE LA LUZ CHAVEZ, CRESCENCIO CHAVEZ, JR., STEVEN CHAVEZ and THE ESTATE OF CRESCENCIO CHAVEZ, SR., are awarded their attorney's fees against defendant, WESLEY KEAT, pursuant to 42 U.S.C. Section 1988 in the sum of $_____; and

Defendants, COUNTY OF RIVERSIDE and JOHN AMMAR, are awarded their costs against all plaintiffs in the sum of $4,400.19; and

Defendant, WESLEY KEAT, is awarded his costs against plaintiffs, MARIA LOUISE HUERTA, ERNESTO G. CHAVEZ, PAULA CHAPPA, ROSE DEL TORO, ARTURO G. CHAVEZ, JUAN FRANCISCO CHAVEZ, DORA LUZ TORRES, and BERTHA PALOMO, in the sum of $777.84.

ORDERED NUNC PRO TUNC AS OF 9/17/92.

DATED: 10/9/92

/s/ E.R. Bishop
HONORABLE EUGENE R. BISHOP
JUDGE OF THE SUPERIOR COURT

BURTON C. JACOBSON, ESQ.
Beverly Hills Law Building
424 South Beverly Drive
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(310) 553-8533 and (213) 879-3611
Bar #027529
Attorney for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF RIVERSIDE

MARIA DE LA LUZ CHAVEZ, et al., Plaintiffs, vs. COUNTY OF RIVERSIDE, et al., Defendants.	CASE NO. INDIO 47976 JUDGMENT (Filed Sep. 17, 1992)

WHEREAS, the above-entitled matter come on for jury trial on July 13, 1992 before the Honorable Eugene R. Bishop, judge presiding in Department A; and

WHEREAS, at the end of the plaintiffs' case in chief, the court granted the Motion for a Directed Verdict by the defendant County of Riverside as to the claims based on the Federal Civil Rights Law; and

WHEREAS, at the conclusion of all of the testimony and evidence the court submitted the matter to the jury and further submitted to them Special Verdicts 1, 2A, 2B, 2C, 3, 4A, 4B, 4C, and 4D, to the jury; and

WHEREAS, the jury in the above entitled action returned its verdicts on July 30, 1992; and

WHEREAS, the jurors found in favor of all Defendants and against all Plaintiffs on Special Verdict's 1, 2A, 2B, 2C, and 3, which verdicts related to the claims made under the State Law of the State of California; and

WHEREAS, the jury found in favor of Plaintiff MARIA DE LA LUZ CHAVEZ with respect to the claims under Federal Law and against Defendant WESLEY KEAT, only, in Special Verdict 4A and assessed general damages in the sum of $400,000.00 and punitive damages in the sum of $100,000.00; and

WHEREAS, the jury returned its Special Verdict 4B in favor of Plaintiff CRESCENCIO CHAVEZ JR., with respect to the claims made under Federal Law and against Defendant WESLEY KEAT, only, and assessed general damages in the sum of $1.00; and

WHEREAS, the jury returned its Special Verdict 4C and found in favor Plaintiff, ESTATE OF CRESCENCIO CHAVEZ SR., with respect to claims made under Federal Law and against Defendant WESLEY KEAT, only, and assessed general damages in the sum of $6,200.00; and

WHEREAS, the jury returned its Special Verdict 4D in favor of Plaintiff STEVEN CHAVEZ with respect to claims made under Federal Law and against Defendant WESLEY KEAT, only, and assessed general damages in the sum of $1.00; and

WHEREAS, the jury found against all Plaintiffs and in favor of Defendant JOHN AMMAR on all counts and in all Special Verdicts; and

WHEREAS, it was stipulated by and between Defendant County of Riverside and Plaintiffs that said Defendant would pay for any and all damages awarded Plaintiff(s) and against either Defendant WESLEY KEAT and/or JOHN AMMAR except for any punitive damages award.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Judgment is entered in favor of Defendant JOHN AMMAR and against all Plaintiffs;

2. Judgment is entered in favor of Defendant COUNTY OF RIVERSIDE and against all Plaintiffs;

3. Judgment is entered in favor of Plaintiff MARIA DE LA LUZ CHAVEZ and against Defendant WESLEY KEAT for general damages in the amount of $400,000.00 and punitive damages in the amount of $100,000.00;

4. Judgment is entered in favor of Plaintiff CRESCENCIO CHAVEZ JR., and against Defendant WESLEY KEAT in the sum of $1.00;

5. Judgment is entered in favor of Plaintiff ESTATE OF CRESCENCIO CHAVEZ SR., and against Defendant WESLEY KEAT in the sum of $6,200.00;

6. Judgment is entered in favor of Plaintiff STEVEN CHAVEZ and against Defendant WESLEY KEAT in the sum of $1.00;

FURTHER, Plaintiffs MARIA DE LA LUZ CHAVEZ, CRESCENCIO CHAVEZ JR., STEVEN CHAVEZ and THE ESTATE OF CRESCENCIO CHAVEZ SR., are awarded their costs in the sum of $975.00; and

Plaintiffs MARIA DE LA LUZ CHAVEZ, CRESCENCIO CHAVEZ JR., STEVEN CHAVEZ and THE ESTATE OF CRESCENCIO CHAVEZ SR., are awarded their attorney's fees pursuant to 42 U.S.C. §1988 in the sum of $_____.

Dated: 9/17/92

/s/ Eugene R. Bishop
EUGENE R. BISHOP
Judge of the Superior Court

Supreme Court Case No. S047342

4th Civil No. E011952

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

MARIA DE LA LUZ CHAVEZ, et al.,

Plaintiffs and Respondents,

vs.

COUNTY OF RIVERSIDE, et al.,

Defendants and Appellants.

Appeal from the Superior Court of Riverside County
Superior Court Case No. I-47976 (Indio)
Honorable Eugene Bishop, Judge

PETITION FOR REVIEW

(Filed Jun. 27, 1995)

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QUESTIONS PRESENTED

1. When a jury exonerates a peace officer from liability for the shooting death of a homeowner after the homeowner, without justification, opened fire on the officer, can a substantial award of compensatory damages intended to compensate plaintiffs for the death be upheld on appeal on the theory that "but for" the officer's illegal entry into the home, the incident (and, therefore, the death) would not have occurred?

2. Does the rule of *Adams v. Murakami* (1991) 54 Cal.3d 105, that a plaintiff seeking punitive damages from a defendant in California must introduce evidence of the defendant's financial condition to support the award apply when state and federal claims are tried together in a California court, or does the burden shift to the defendant to introduce evidence of his financial condition to support plaintiff's claim of punitive damages under the federal claims, thus relieving the plaintiff of his or her burden under the state claims?

3. Does due process require that a plaintiff produce evidence of the defendant's financial condition to support an award of punitive damages?

4. Do California's standards for reviewing punitive damage awards meet constitutional muster under *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1 [113 L.Ed.2d 1, 111 S.Ct. 1032]?

* * *

1. The Court of Appeal's conclusion that a police officer may be held liable for damages stemming from the death of an individual slain by the officer during the course of an illegal entry even where a jury has expressly found there to be no wrongful death under state law and, more critically, no use of unreasonable, excessive force under the Fourth Amendment, flies in the face of the controlling decisions of both this Court and the United States Supreme Court. As this Court has recognized, "but for" causation is not a sufficient basis upon which to impose damages and public policy dictates that liability be limited in particular circumstances. (*Borer v. American Airlines, Inc.* (1977) 19 Cal.3d 441, 446.) Public policy clearly dictates such a restriction of causation in the instant case. Law enforcement officers most certainly should not illegally enter a residence. Yet, at the same time, an officer should not be required to pay for such a mistake with his or her life or that of a colleague or an innocent bystander. A homeowner does not have a right to shoot a uniformed officer, even one illegally in his or her home, so long as the officer does not present an unlawful violent threat against the homeowner or the homeowner's family. However, that is precisely the result countenanced by the Court of Appeal's decision here.

Moreover, the Court of Appeal's analysis of this issue is inconsistent with controlling United States Supreme Court authority. In *Graham v. Connor* (1989) 490 U.S. 386 [104 S.Ct. 1865, 104 L.Ed.2d 443], the Supreme Court held that all claims for damages arising from the use of force by a law enforcement officer must be evaluated under a single standard – whether under a totality of the circumstances the officer's use of force was "reasonable." Here, the jury, having been instructed on the *Graham* rule, expressly found that no excessive force was used and that Keat's actions in shooting Mr. Chavez were reasonable. The strict *Graham* standard cannot be circumvented simply by extending the chain of causation so that some other purportedly unconstitutional conduct by an officer can be said to have led to the use of force.

* * *

3. This Court should also grant review to resolve two issues which it expressly reserved in *Adams:* whether due process requires that evidence of a defendant's financial condition be introduced by a plaintiff in order to sustain a punitive damage award (a contention rejected in the published portion of the Court of Appeal's opinion), and whether the California scheme for reviewing punitive damage awards satisfies the standards enunciated in *Haslip.* These are clearly important issues affecting virtually every punitive damage claim in the State of California and, following the Court of Appeal's decision in this case and its previous decision in *Barber,* particularly those federal claims brought in state court which result in punitive damage awards. Thus, for this reason too, review is warranted.

Fourth Appellate District, Division Two, No. E011952
S047342

IN THE SUPREME COURT OF CALIFORNIA

MARIA DE LA LUZ CHAVEZ,
Respondent

v.

WESLEY KEAT, Appellant

(Filed
Aug. 21, 1995)

The time for granting or denying review in the above cause is hereby extended to and including September 25, 1995, or the date upon which review is either granted or denied.

/s/ Illegible
Acting Chief Justice

Fourth Appellate District, Division Two, No. E011952
S047342

IN THE SUPREME COURT OF CALIFORNIA

MARIA DE LA LUZ CHAVEZ,
Respondent

v.

WESLEY KEAT, Appellant

(Filed
Sep. 14, 1995)

Appellant's petition for review DENIED.

Kennard, J. is of the opinion the petition should be granted.

/s/ LUCAS
Chief Justice

Supreme Court, U.S.
FILED
JAN 12 1996
CLERK

No. 95-933

In The

Supreme Court of the United States

October Term, 1995

WESLEY KEAT,

Petitioner,

vs.

MARIA DE LA LUZ CHAVEZ, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal, Fourth Appellate District, Division Two

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the Fourth Amendment to the Constitution of the United States limit a peace officer's liability for violations thereof *only* to instances where the peace officer uses "excessive force"?

2. Did the standards for reviewing punitive damage awards in this California case meet constitutional standards?

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APPENDIX

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Respondents, Maria De La Luz Chavez, *et al.*[1] respectfully request that this Court deny the Petition for Writ of Certiorari which seeks review of the Decision of the California Court of Appeal, 4th Appellate District, Division Two, which is partially reported at 34 Cal. App. 4th 1406, 41 Cal. Rptr. 2d 72 and (Cal. Ct. App. 1995, and is reprinted in Appendix 1 of the Petition for Certiorari). The Judgment of the Riverside County Superior Court that was affirmed by the California Court of Appeals was not reported. That Decision is reprinted in Petitioner's Appendix at pages 82 to 90.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and not Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

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1. The full list of Respondents is included in the List of Parties (Rule 14.1(b)) section of Petitioner's Petition for Certiorari.

> the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statue of the District of Columbia.

STATEMENT OF JURISDICTION

Respondents submit that Petitioner has manufactured facts as they would like them to be and which were not found to be by the jury in the instant case. From the said manufactured facts they raise law which is inapplicable to the case at bar.

Respondents submit that this Court should not have jurisdiction to review the decision of the California appellate court by this Writ of Certiorari because none of the possible

questions presented by the Petitioner fall within Supreme Court Rule 10(c). Their questions present no important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decision of this Court.

STATEMENT OF THE CASE

Petitioner's statement of questions presented, and Petitioner's statement of the facts of the case, is misleading and misstates the findings of the jury in the underlying case. Petitioner's questions and statements of fact are biased in the extreme and are improper argument for a Petition for Writ of Certiorari by this Court. Petitioner attempts to bootstrap himself in an attempt to bring him within the jurisdiction of this Court by misleading misstatements of the facts of this case as he wishes they were; when factually they are not.

From these misleading misstatements of manufactured facts he tries to use issues of law that are inapplicable. It is not this Court's function to rule on facts or credibility of witnesses. That was the jury's function and they performed it.

The misleading misstatements of facts by Petitioner is not new. Similar attempts were made when the matter was under consideration for review by the California Supreme Court (which review was denied by said court as stated in App. 96 of the Petition).

The misstatements were so blatant and troublesome that the trial court judge wrote to the attorney for the County of Riverside and this writer, with a copy to the Chief Justice of the California Supreme Court, because he was troubled by it. Attached to this Brief in Opposition as Appendix B is a copy of said letter.

Contrary to Petitioner's allegations, at no time did the jury find that the use of the gun by Crescencio Chavez Sr. was illegal or wrongful in any way.

RESPONDENTS' STATEMENT OF THE CASE, WHICH IS AMPLY SUPPORTED BY THE RECORD, IS HEREIN PRESENTED:

On November 8, 1985, at approximately 6:00 p.m., Lorinda Rios telephoned the Riverside Sheriff's Department because there was a loud argument between her brother Danny Rios and her father Casimero Rios. She told the police that there was an argument going on and asked if they could send someone over to calm it down. The argument ended in a few moments and Lorinda Rios called the Sheriff again, telling them that they were no longer needed because her brother had left the house and there was no longer an argument.

The dispatcher, after receiving the first phone call from Lorinda Rios, put out a call of a *verbal* disturbance at the Rios' residence (which was next door to the Chavez' residence). The call also indicated that it was *verbal only* and there were no weapons involved. Sheriff's deputies John Ammar ("Ammar") and Wesley Keat ("Keat") (Petitioner herein) responded to the call. John Ammar was the primary deputy responding, and Wesley Keat, who arrived first, was the back-up deputy responding.

At the time that Keat arrived at the scene, standing in the side yard of the Chavez' residence was Crescencio Chavez Jr. ("Junior"), Danny Rios ("Danny") and Junior's infant son, Stephen Chavez ("Stephen").

At that time, Junior was estranged from his wife and was concerned that she would send the police to take Stephen away from him.

Upon seeing the police vehicle parked across the street, Junior went into the Chavez residence along with his son, Stephen.

It is undisputed that Keat went into the Chavez house without a warrant and without first knocking and announcing himself. It is further undisputed that Keat knew, when he went into the Chavez house, that it was not the address reported by the dispatcher, and that he heard, and was personally aware of the recall of that call from the dispatcher.

Not only did Keat not have a warrant nor knock and announce himself when entering the Chavez home, he did not knock and announce himself at the bedroom door where he says he was searching for Junior and, further, that he did not knock and announce himself at the bathroom door where he encountered Junior and Stephen.

Keat, upon attempting to gain entry, was confronted near the front door by Crescencio Chavez, Sr. ("Senior"). Mr. Chavez Sr. did not speak English. Keat understood very little Spanish.

After entering the residence, Keat illegally commenced a search of the house; when Keat got to the bathroom beyond the back bedroom where Junior and Stephen were, *he drew his gun and aimed it at Junior* through the ajar door. Junior asked Keat to put the gun away and he did. Keat then pulled Junior down the hallway while Junior was holding his infant son in his arms. Junior kept asking Keat what the problem was but Keat never answered.

When Keat, Junior and Stephen got to the living room, Junior again asked what the deputy wanted, with no response from Keat, he began striking Junior repeatedly with his service flashlight. During that struggle, Maria De La Luz Chavez

attempted to get her grandson Stephen away from the fray and out of harms way.

When Mrs. Chavez attempted to get her grandson, she was hit with the back of Keat's hand and thrown back. When Deputy Ammar arrived he also grabbed her by her collar and waist and threw her across the room and eventually across a coffee table.

Confronted by the scene described above, Senior fired a gun into the air, *i.e.*, the ceiling. The two Officers drew their weapons and fired at Senior, killing him. Witnesses to the shooting death of Senior were his wife Maria De La Luz Chavez, his grandson Stephen Chavez and his son Junior. Additionally, independent eyewitness Casimero Rios testified that Senior fired into the air and independent eyewitness Harry De Leon testified that he saw Senior fire into the ceiling.

It should be noted that both Casimeros Rios and Harry De Leon were not involved in any way, shape, manner or form other than that they were eyewitnesses to the events described above. They were standing in the doorway after hearing the fracas described above and remained there throughout all of the events stated above.

Junior and Mrs. Chavez were handcuffed, arrested for murder and taken to the police station. The charges filed against them were eventually dropped.

Based on the above stated facts, the court properly instructed the jury (without any objection from the Petitioner) as to proximate cause and concurring causes.

Petitioner offered no instruction concerning an intervening superseding cause or event.

Petitioner now asks this Court to usurp the province of the jury and redetermine credibility and facts.

As previously stated, Petitioner has pressed the same misleading misstatements of fact and law to the trial court as well as to the Court of Appeals; and, in a Petition for Review to the Supreme Court of the State of California. Petitioner was rebuked each and every time.

A copy of the trial court's ruling on the post jury trial motions is attached to this Brief in Opposition to the Petition for Certiorari as Appendix A.

A copy of the Opinion of the California Court of Appeal, 4th District, Division 2 appears in Appendix 1 of the Petition for Certiorari.

A copy of the ruling in the Supreme Court of California appears at Appendix 96 in the Petition for Certiorari.

REASONS FOR DENYING THE WRIT

I.

DOES THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES LIMIT A PEACE OFFICER'S LIABILITY FOR VIOLATION THEREOF ONLY TO INSTANCES WHERE THE PEACE OFFICER USES EXCESSIVE FORCE?

Petitioner's rely solely on *Graham v. Connor,* 490 U.S. 386 (1989).

Graham v. Connor is an "excessive force" case. Nothing in the *Graham v. Connor* case addressed rights granted by the

Fourth Amendment, such as liability for an unreasonable search or liability for an unreasonable seizure. Those questions were answered by the jury when they found that the Petitioner had violated those Fourth Amendment rights against the Respondents and awarded Respondents an amount of damages that they felt was appropriate for said violations.

It is respectfully submitted that it is not the function of this Court to substitute its judgment as to the reasonableness of the jury's award in assessing the appropriate amount of damages for said violations [This is especially true after the award was affirmed by the trial judge, the California Court of Appeal, and a denial of a review by the California Supreme Court.]

The Court of Appeal, based on their review, found that there was *proximate cause* which led to the death of Crescencio Chavez Sr., resulting from the civil rights violations *admittedly committed* by Petitioner Keat.

A homeowner does not have the right to shoot a uniformed officer, even when illegally in his or her home, *so long as the officer does not present an unlawful violent threat against the homeowner or the homeowner's family.*

The evidence clearly established, and the jury obviously found, that Petitioner *did* present such an unlawful and violent threat.

The record is replete with evidence showing that the Petitioner acted like a "thug" and he freely admitted from the witness stand his various violations of law, as though he were proud of it. He now has the unmitigated gall to ask this Supreme Court to accept this case for certiorari claiming that the homeowner's actions were improper when the record clearly shows that Petitioner was beating Crescencio Chavez Jr.; hitting

and manhandling Maria De La Luz Chavez; manhandling Steven Chavez; and refusing to follow even the most basic rules concerning a peace officer's conduct. As the Court of Appeal noted, Mr. Chavez Sr., eventually, in a misguided attempt to stop the melee, fired a gun. (Appendix 2 to the Petition for Certiorari). Independent witnesses testified that Mr. Chavez' gun was fired into the ceiling.

Petitioner would certainly like this Court to never know what really occurred on that fateful evening; however, the record amply bears out Petitioner's brutish character as stated.

The Federal Civil Rights Act (42 U.S.C. § 1983) is replete with cases of police abuses and misconduct. The very purpose of that act is to address and redress police misconduct and abuses. It is the result of civil rights' verdicts that Americans have come to expect that they will be secure in their homes and that the guarantees of the Constitution of the United States and the laws of the land, will be obeyed, not only by them, *but especially by those sworn to enforce and protect them.*

If Petitioner had properly obeyed the laws that he was sworn to uphold, none of these tragic events would have occurred. As a matter of fact, the jury recognized the differences between the illegal and thugish tactics of Petitioner Keat as compared to that of Deputy Ammar when they ruled in favor of Deputy Ammar while holding Keat civilly liable.

This Honorable Court should not grant certiorari for those reasons.

The jury in the case at bar awarded approximately $400,000 in compensatory damages against Petitioner for his civil rights violations and also awarded the sum of $100,000 as punitive damages against said Petitioner.

Petitioner wants this Court to accept this case for review without bringing it within the criteria established in Supreme Court Rule 10. He is unable to state what question, under Rule 10, requires settlement by this Court.

II.

DID THE STANDARDS FOR REVIEWING PUNITIVE DAMAGE AWARDS IN THIS CALIFORNIA CASE MEET CONSTITUTIONAL STANDARDS?

Courts have long reasoned that federal rather than state law should apply to federal claims brought under the Federal Civil Rights Act, an Act which has been in existence since the Civil War.

Under federal law, the defendant has the burden of introducing evidence of his own financial condition. *Woods-Drake v. Lundy,* 667 F.2d 1198, 1203, fn. 9; *Tri-Tron Intern v. Velto,* 525 F.2d 432, 438 (9th Cir. 1975).

The United States Supreme Court in *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 111 S. Ct. 1032 (1991), indicated that a punitive damage award can violate federal constitutional due process *only* if it was reached in proceedings lacking the basic elements of fundamental fairness. *That is not the contention of the Petitioner herein.* Rather, the Petitioner would like this Court to overrule prior decisions of the United States Supreme Court.

The jury in the instant matter was properly instructed on the issue of punitive damages and they were given both the state instruction for punitive damages for the state based claims, and the federal instruction for punitive damages for the federally-based civil rights claims.

It is important to note that the Petitioner, in requesting special findings, never requested a finding as to whether the jury found that Petitioner Keat acted "*wantonly*".

"Wanton action" is one of the elements giving rise to punitive damages in a federal civil rights claim.

The United States Supreme Court has applied Section 1983 damage policies uniformly throughout the country, and the policies followed do not depend on the law of the state in which the federal court sits.

In addition to *Pac. Mutual v. Haslip, supra,* another leading United States Supreme Court Section 1983 punitive damage case is *Smith v. Wade,* 461 U.S. 30 (1983). *Smith v. Wade* involved the standards that govern the awards of punitive damages. In upholding the use of a federal "recklessness" standard for punitive damages in Section 1983 cases, Justice Brennan, writing for the Supreme Court in *Wade,* did not look to the then current Missouri law.

In relying on federal principles to decide Section 1983 damage cases, the Supreme Court has required damages to be based on policies that best serve the purposes of the civil rights statutes. 42 U.S.C. § 1983 damages are based on uniform federal standards.

The Supreme Court in *Smith v. Wade,* 461 U.S. 30 at page 51 stated:

> Reckless or callous disregard for the plaintiff's rights, as well as intentional violations of Federal law, should be sufficient to trigger a jury's consideration of the appropriateness of punitive damages.

See also Savarese v. Agriss, 883 F.2d 1194 (3rd Cir. 1989) reversing a judgment for a defendant on the basis of an ambiguous jury instruction that did not make clear that punitive damages were available in 1983 cases based on conduct that was either reckless or in callous disregard of plaintiff's constitutionally-protected right.

State courts, throughout the country, that have addressed the damages available in Section 1983 actions have applied the same policy used by federal courts. *Sundholm v. City of Bettendorf*, 389 N.W. 2d 849 (Iowa 1986); *Blessum v. Howard County Board of Supervisors*, 295 N.W. 2d 836, 844-46 (Iowa 1980); *Rzeznik v. Chief of Police of South Hampton*, 10 Mass. App. 335, 407 N.E. 2d 389 (1980); *Orr v. Crowder*, 315 S.E. 2d 593, 611-12 (W. Va. 1983), *cert. denied*, 469 U.S. 981 (1984); *Thompson v. Village of Hales Corners*, 115 Wis. 2d 289, 340 N.W. 2d 704, 711 (1983).

State courts have awarded significant awards of compensatory and punitive damages in Section 1983 actions based on federal standards. *Higgs v. District Court*, 713 P.2d 840 (Colo. 1985) upholding $770,000 in compensatory and $250,000 in punitive damages against law enforcement officials, including prosecutors, for unconstitutional investigatory activity involving photo identification of suspects; *City of Amarillo v. Langley*, 651 S.W. 2d 906 (Tex. Ct. App. 1983) ($100,400 award for lost wages for improper use of police cars to block fleeing motorcyclists).

State courts that have addressed the availability of punitive damages in Section 1983 cases have followed federal standards on the definition of punitive damages. *Yaeger v. Hurt*, 433 So. 2d 1176 (Ala. 1983); *Dickerson v. Young*, 332 N.W. 2d 93 (Iowa 1983); *Falkenstein v. City of Bismark*, 268 N.W. 2d 787 (N.D. 1978).

The Supreme Court's decisions in *Smith v. Wade, supra*, and

Pac. Mut. Life Ins. Co. v. Haslip, removed any doubt that federal law that might even arguably have permitted courts to look at state law to fill in the gaps.

In the trial court's federal instructions to the jury the court instructed that the jury could find punitive damage where an act was "wantonly" done. The court instructed:

> An act or a failure to act is "wantonly" done if done in reckless or callous disregard of, or indifference to, the rights of one or more persons, including the injured person.

That quoted portion of the instruction is virtually verbatim from the United States Supreme Court's decision in *Smith v. Wade*, 461 U.S. 30, 51.[2]

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2. Petitioner's claim that the California Code of Civil Procedure § 657 gives them no post trial basis for offering evidence on punitive damages is also without merit.

In *Lovett v. Dintzer*, 131 Cal. 2d 115, 280 P.2d 58 (1955) the court states that evidence as to amount of damages may be considered anew by the trial judge in ruling on a motion for new trial.

There are likewise no restrictions when presenting a motion for a judgment notwithstanding the verdict (as was done in this case) pursuant to California Code of Civil Procedure § 659.

However, since federal law applies to federal claims, *this is really a non-issue.*

There is uniformity in the California District Courts of Appeal on the application of federal law concerning punitive damages when a federal claim is involved.

The Second District Court of Appeal in *Barber v. Rancho Mortgage & Investment Corp.*, 26 Cal. 4 1819 (1994) ruled precisely the same as the Fourth District Court of Appeal did in the instant case.

Both Courts of Appeal held that federal law regarding punitive damages applied to federal causes of action. Therefore, there is no lack of uniformity in the California appellate courts. Petitioner is therefore, unable to claim that as a ground for granting a Petition for Certiorari by this Honorable Court.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A—TRIAL COURT'S RULING ON MOTIONS

[Commencing at Transcript Page 1101]

* * *

THE COURT: All right. Gentlemen, first of all, I felt then and I feel now that the verdict was a proper one.

With respect to the punitive damages, I have been concerned about that, and I think we talked a little bit about it before we left when the case concluded. I think that the punitive damages were warranted, and I think the amount that was awarded was reasonable. What has concerned me though is whether or not under the state law in Adams they should be permitted or whether they should not be.

Given that we used federal law for so much of the case and that the award of the punitive damages was with respect to the civil rights violation, I am going to allow them to stand.

With respect to jury misconduct, I don't feel that what took place there reaches the level of jury misconduct which should cause the case to be retried or give a — or cause a judgment notwithstanding the verdict, so a new trial and the judgment notwithstanding the verdict motions are denied.

On the qualified immunity question,-I don't know that anything needs to be said about it except that if — I will add this for whatever it is worth. Had I been asked to determine that before it went to the jury, I would have found that they did not have qualified immunity.

* * *

APPENDIX B—LETTER OF JUDGE EUGENE R. BISHOP DATED JULY 13, 1995

SUPERIOR COURT OF CALIFORNIA
IN AND FOR THE
COUNTY OF RIVERSIDE

JULY 13, 1995

CHAMBERS OF
EUGENE R. BISHOP
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RE: CHAVEZ V. KEAT
CAL APP 4TH 4TH CIVIL NO. EU 11952

Dear Messrs. Jacobsen and Porter:

I am concerned about letters being sent to the Chief Justice of the Supreme Court urging review of the above case which either

misstates the evidence of the case or omits some important fact, i.e. Mr. Porter's recent letter which does not mention that the domestic disturbance call was cancelled before Deputy Keat arrived. These letters should either list the facts as they were presented at trial or make no statement of fact at all.

Yours truly,

s/ Eugene R. Bishop
EUGENE R. BISHOP
JUDGE OF THE SUPERIOR COURT

ERB/sh

cc: Chief Justice Malcolm Lucas

RECEIVED

JULY 17, 1995

Supreme Court, U.S.
FILED
JAN 19 1996
CLERK

No. 95-933

In The

Supreme Court of the United States

October Term, 1995

WESLEY KEAT,

Petitioner,

v.

MARIA DE LA LUZ CHAVEZ, et al.,

Respondent.

Petition For Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division Two

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I.

THE RECORD CLEARLY FRAMES THE FOURTH AMENDMENT ISSUE PRESENTED – WHETHER A POLICE OFFICER MAY BE HELD LIABLE FOR USE OF FORCE DURING THE COURSE OF AN ILLEGAL SEARCH, EVEN THOUGH A JURY HAS FOUND THAT THE FORCE USED WAS REASONABLE UNDER *GRAHAM V. CONNOR*, 490 U.S. 386 (1989) AND JUSTIFIED SELF-DEFENSE UNDER APPLICABLE TORT PRINCIPLES.

Two tactics are evident in Respondents' Brief in Opposition to Keat's Petition for Certiorari. The first is to ignore the plain holding of the Court of Appeal's opinion that Keat may be held liable for Crescencio Chavez, Senior's death because Keat's illegal entry was a "remote," "but for" proximate cause of the death, notwithstanding the jury's finding that Keat's use of force was reasonable under *Graham v. Connor*, 490 U.S. 386. (Pet. for Cert., App. pp. 6-9.) The second tactic is to accuse Keat of distorting the record in hopes that even if the Court correctly perceives the legal issue presented to be compelling and warranting review, nonetheless it may be reluctant to grant certiorari based on its impression that the factual record is muddy and hence the issue may not be properly framed. The Court should not be misled by respondents' efforts.

First, simply ignoring the Court of Appeal's unsupported and troublesome holding does not make it disappear nor eliminate its devastating impact on the heretofore settled rules governing use of force by police officers. Here, liability has been imposed on a police officer for use of force during the course of a search and

arrest despite a jury's finding that the force was reasonable under the totality of the circumstances standard of *Graham* and in fact justified self-defense under standard tort principles. Thus, under the holding in this case, in making a split-second decision on whether to utilize force, an officer must focus not simply on the circumstances and, indeed, specific threat directly before him, but on the entire chain of conduct leading up to the situation – an inquiry that may jeopardize the lives of police officers and innocent bystanders as well.

Second, there has been no distortion of the record by Keat. As a threshold matter, as noted above, the Court of Appeal's opinion clearly frames the use of force issue as one of proximate causation, i.e., the illegal entry as a "remote," "but for" cause of Mr. Chavez's death, with no discussion of any of the facts respondents now urge as a basis for supporting the judgment.

Morover, respondents' arguments and characterization of the record simply underscore what is going on here – an unsuccessful excessive force claim is being shoehorned into an illegal entry claim. Thus, while respondents admit the jury found Keat liable based upon his illegal entry, they tellingly attempt to support the judgment by relying on an interpretation of the record that focuses squarely on the use of force inquiry, i.e., *whether Keat presented "an unlawful violent threat against the homeowner or the homeowner's family," so as to have justified Mr. Chavez's use of force against him.* (Respondents' Brief in Opposition ("RBIO"), p. 8.) Indeed, respondents assert "the evidence clearly established, and the jury obviously found, that petitioner *did* present such an unlawful and

violent threat." (*Id.*; emphasis in original.) This is completely contrary to the record.

It is respondents who are asking this Court to ignore the specific findings of the jury, i.e., that Deputy Keat lawfully used force to protect himself and his partner under *Graham v. Connor*. All of the facts set forth at pages 5-6 of Respondents' Brief in Opposition could have supported a verdict in favor of plaintiffs on the excessive force claim. The problem for respondents is that the jury, in making its finding that Keat *reasonably* used force to defend himself under *Graham*, clearly rejected any notion that Keat himself or his partner, Ammar, presented an unlawful threat to Mr. Chavez or the other members of the Chavez family. Respondents assert the jury made no finding that Mr. Chavez's use of a gun was "illegal or wrongful in any way." (RBIO, p. 4.) But the jury's verdict cannot be rationally construed any other way. Keat's sole defense to the excessive force and wrongful death claims was justified self-defense, while respondents' justification for Mr. Chavez's attack was protection of himself and his family. A jury could not conclude that Deputy Keat reasonably used force against Mr. Chavez while at the same time somehow concluding that Keat and Ammar were unlawfully assaulting and endangering other family members.

Respondents' Brief in Opposition also contains two inaccurate assertions with respect to the record in this case. First, respondents correctly note that two witnesses at trial testified that Mr. Chavez shot at the ceiling during the melee and thus assert that this somehow supports the jury's finding Keat should be liable for Mr. Chavez's death based upon the illegal entry. (RBIO, p. 6.) As a

threshold matter, these facts again go to the propriety of the use of force by Keat against Mr. Chavez under the standard articulated in *Graham*, and if anything underscore the inconsistency in the jury's verdict. If, as respondents assert, the jury believed that Mr. Chavez simply fired at the ceiling and did not reasonably present a threat to the officers, why then did it find that the officers reasonably believed that Mr. Chavez was shooting at them? The reality is, as noted in the petition and ignored by respondents, that the jury was presented with two diametrically opposed stories of what occurred – Keat and Ammar testifying that Mr. Chavez fired at them (with Keat saying a bullet whizzed passed his head and Deputy Ammar receiving a bullet hole in his arm) and respondents asserting Mr. Chavez merely fired at the ceiling. Quite simply, the jury could not have believed respondents' version of these facts and exonerated Keat and Ammar from liability under *Graham*. In addition, although two witnesses testified that at one point Mr. Chavez fired at the ceiling, they did not indicate that he did not at some other point fire at the two officers.

Second, respondents assert that the trial court judge found it necessary to write the California Supreme Court concerning various factual misstatements purportedly made by petitioner in seeking review. (RBIO, p. 3.) This is nothing more than mudslinging, and inaccurate mudslinging at that. The misstatement referred to in the trial judge's letter was not made by counsel for petitioner Keat, but by counsel for the County of Riverside, which was not a party to the appeal. Hence, any purported inaccuracy in a letter written by that party to the

Supreme Court cannot be attributed to Keat. More critically, and conspicuously, the trial judge's letter does not suggest that Keat or anyone else made any sort of omission or misstatement with respect to the facts surrounding Keat's use of force, i.e., whether he did or did not present a threat to the Chavez family, or whether Mr. Chavez could reasonably believe he did so. Rather, the factual inaccuracy raised in Judge Bishop's letter concerns the lawfulness of the entry, i.e., whether a domestic disturbance call was canceled before Keat arrived and is hence irrelevant to the use of force issue presented here. (See RBIO, pp. 2a-3a.) Once again, respondents' argument appears to be nothing more than a calculated effort to blur the record in an attempt to make this case an unattractive one for review.

The plain truth is that having been denied recovery on their excessive force claims, respondents' seek to resurrect them in the context of an illegal entry claim. The problem remains as set forth in the petition for certiorari: A police officer has been found liable for damages arising from the use of force during the course of a search and detention, notwithstanding the fact that a jury expressly found that the use of force was reasonable under the totality of circumstances test of *Graham v. Connor*. This rule of "but for" liability arising from the legal entry has created uncertainty in an area of the law in which clear and firm standards may quite literally be a matter of life or death. It is therefore necessary for this Court to grant certiorari to resolve this critical issue.

II.

RESPONDENTS MISAPPREHEND PETITIONER'S DUE PROCESS ARGUMENT AND PRESENT NO VALID ARGUMENT IN OPPOSITION TO REVIEW OF THIS ISSUE.

In his petition Keat argued that requiring a defendant to present evidence of financial condition in order to avoid an unconstitutionally destructive punitive damage award violates due process. (Pet., pp. 22-29.) Respondents do not even attempt to address this argument. Respondents instead appear to be addressing an argument raised by Keat in the California Supreme Court, but not presented here, i.e., whether a federal claim brought in California state court is subject to California law requiring a plaintiff to produce evidence of a defendant's financial condition in order to sustain a punitive damage award as required by *Adams v. Murakami*, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991). Respondents also appear to be addressing some sort of self-invented argument concerning the standards for imposing punitive damages. (See RBIO, pp. 12-13 [noting that "state courts that have addressed the availability of punitive damages in section 1983 cases have followed federal standards on the definition of punitive damages" and that the punitive damage instruction in the case "is virtually verbatim from the United States Supreme Court's decision in *Smith v. Wade*, 461 U.S. 30, 51 (1983)"].)

Keat submits that respondents have presented no argument with respect to the critical due process issue raised in this case because they have no response. As detailed in the petition for certiorari, there are grave due process problems with the system utilized by the federal

courts and the majority of states to impose punitive damages on a defendant: Placing the burden of proof on a defendant to avoid an unconstitutionally destructively punitive damage award. Given the widespread application of this rule and its flaws under the Due Process Clause, review is amply warranted.[1]

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[1] At the risk of getting into a "battle of footnotes," petitioner must point out a flat misstatement of California law in respondents' brief in opposition. In his petition for certiorari, Keat observed by way of footnote that the California Court of Appeal had twice seemingly taken him to task for not presenting evidence of his financial condition post-verdict in the context of a motion for new trial. The court apparently recognized that this was irrelevant to Keat's contention that the Due Process Clause barred imposing such a requirement on him, but nonetheless Keat noted that the court of appeal's suggestion that such evidence could be presented by way of new trial motion was inconsistent with California statutory law. (Pet. for Cert., p. 23, fn. 5, citing Calif. Code Civ. Proc. § 658.) Citing *Lovett v. Dintzer*, 131 Cal. App. 2d 165, 280 P.2d 58 (1955), respondents assert that "evidence as to amount of damages may be considered anew by the trial judge in ruling on a motion for new trial." (RBIO, p. 13, fn. 2.) However, *Lovett* merely holds that the trial judge may consider the evidence presented *at trial* anew and in no way suggests that the court may review post-trial declarations in determining whether a verdict is excessive. As noted above, California Code of Civil Procedure section 658 clearly forecloses presentation of such evidence by way of a motion for new trial for excessive damages. Respondents also assert that "[t]here are likewise no restrictions when presenting a motion for judgment notwithstanding the verdict (as was done in this case) pursuant to California Code of Civil Procedure § 659." (RBIO, p. 13, fn. 2.) The problem is, of course, that an argument that damages are excessive pertains to the defendant's right to a *new trial*, not judgment in his or her favor on a punitive damage claim. In sum, if Keat proved that the punitive

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for certiorari should be granted.

Dated: January 17, 1996

Respectfully submitted,

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damage award vastly exceeded his net worth and was hence unconstitutionally destructive, his remedy would be a new trial, not judgment in his favor on the punitive damage claim. Thus, Keat would have no legal basis to introduce evidence of his financial condition for purposes of a motion for judgment notwithstanding the verdict. Keat's due process argument for judgment is based upon his contention that due process requires that plaintiff bear the burden of proof on the issue of financial condition and that there has been a failure of proof on the issue here, thus requiring judgment in his favor on the punitive damage claim.